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No. 80-2205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois,

Petitioner,

vs.

TONI MURRAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether judicial immunity cloaks the Clerk of the Circuit Court of Cook County from liability for damages in a Sec. 1983 Civil Rights suit for acts taken by the Clerk in the discharge of his official duties.

LIST OF PARTIES BELOW

The parties in the Court below not named in the caption on this petition are defendants City of Chicago, John Ziemke, Theodore Pappas, James Rochford and James O'Grady.

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MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the proceedings on November 25, 1980, as amended on March 11, 1981.

OPINION BELOW

The opinion of the Court of Appeals is reported at 634 F.2d 365 (7th Cir. 1980) and appears herein as Appendix A. The ruling of the District Court is not reported, and appears herein as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on November 25, 1980. A timely petition for rehearing *en banc* was denied as modified on March 31, 1981. That order appears herein as Appendix C. This petition was filed within 90 days from that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 42 U.S.C.

§ 1983. Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The case presents the question whether the Clerk of the Court is entitled to judicial immunity from damage liability pursuant to 42 U.S.C. § 1983, for his official actions in implementing procedures for recalling arrest warrants such as the one issued by the Circuit Court for

the respondent. The petitioner contends that as the Clerk of the Court he is entitled to judicial immunity. The respondent contended below that the Clerk is not immune and maintained that the Clerk is liable because he did not take more care in implementing the pre-existing notification phase of the explicit procedures for recalling the arrest warrant naming the respondent. The Seventh Circuit Court of Appeals agreed with the respondent that she was entitled to further discovery to identify who was at fault for the wrong done her and reversed the District Court's summary judgment order which was in favor of the Clerk of the Court.

The respondent alleged that she was arrested on an arrest warrant which was void, having been recalled by judicial order prior to her arrest. She claimed that she was injured during the arrest and subsequent six to seven hour detention, and that the Clerk of the Court, among others, was liable for these injuries because he

> ". . . and those other of his fellow servants and employees also responsible on 13 January 1975 and on 25 March, 1975 for authorizing, approving and implementing their duty to expeditiously communicate judicial orders concerning arrest warrants, did not, prior to 25 March 1975, fulfill their constitutional duty to communicate in a reasonable manner to these law enforcement defendants the fact that a judicial order of two and one-half months earlier had made illegal and unconstitutional the conduct then occurring upon and toward plaintiff on or about 25 March 1975."

Clerk Finley moved for summary judgment on the grounds that the Clerk's office has detailed procedures for handling and communicating judicial orders concerning arrest warrants, and that the procedures were followed as to the warrant on which the respondent was arrested.

It is undisputed that the Clerk's procedures regarding warrant recall orders were formulated in 1974 by a joint committee of representatives from the Chicago Crime Commission, the state judiciary, the Chicago Police Department, the Cook County State's Attorney's Office and the Circuit Court Clerk's Office. Deputy clerks were first advised of the new procedures by office memorandum. The procedures are detailed in the Clerks' Operating Manual, copies of which are circulated among all deputy clerks.

It is undisputed that the deputy clerk responsible for the processing of the recall of respondent's arrest warrant properly followed the applicable procedures with regard to recalling the warrant for her arrest. However, the Police Department had no record of having received its copy of the recall form.

The respondent filed a single brief in opposition to all of the petitioner's pre-trial motions, but submitted no evidence to controvert any of Clerk Finley's affidavits and documents. In light of Morgan Finley's uncontradicted evidence the District Court concluded that the Clerk's warrant recall procedures are constitutional and that they were followed as to the respondent:

> "A careful examination of the procedures in effect at the time of the alleged occurrences, as shown by the documents and affidavits filed by the defendant Finley, shows that the warrant recall procedures of the Circuit Court of Cook County are more than adequate to satisfy constitutional requirements. Deputy Clerks are instructed to effectuate the notification of the Chicago Police Department of the recall of an arrest warrant on the same day that the judicial recall is entered. All personnel are aware of the serious consequences of a failure to so notify the Police Department in a timely manner. Several copies of the orders are filed with the Police

> Department and with the Clerk's office as well as being placed in the official court file. . . .
>
> "Furthermore, the affidavit of Maurice McNicholas and Exhibit B filed by the plaintiff show that the procedures outlined previously were followed as to the plaintiff's arrest warrant. At best, it can only be said that if the Police Department did not receive notice of the recall, the subsequent arrest of the plaintiff was the result of inadvertence or accident. Such circumstances cannot give rise to an action under 42 U.S.C., Section 1983, *Little v. Walker*, 552 F.2d 193, Seventh Circuit, 1977; *Bonner v. Coughlin*, 545 F.2d 565, Seventh Circuit 1976." (Appendix B)

In accordance with these conclusions and with his conclusion that there was no genuine issue of fact which could result in any judgment other than one for the Clerk, the District Judge granted petitioner Finley's motion for summary judgment.

The Seventh Circuit reversed and held that "someone is surely at fault for failing to establish or execute appropriate proceedings for presenting such serious malfunctionings in the administration of justice." *Murray v. City of Chicago*, 634 F.2d at 366. The Seventh Circuit concluded that deciding whether the Clerk of the Court was entitled to official immunity would be "premature." *Murray v. City of Chicago*, 634 F.2d at 367, n. 4.

On March 11, 1981, subsequent to the filing of the Clerk's Petition for Rehearing *En Banc* and prior to the March 31, 1981, denial of the petition, the Seventh Circuit amended its opinion and Circuit Judge Swygert filed a concurring opinion. The Seventh Circuit amended the opinion by adding to footnote 4 that "(m)ere negligence, of course, will not support a Sec. 1983 action

against Finley." See *Bonner v. Coughlin*, 545 F.2d 565, 568 (7th Cir. 1976). Judge Swygert agreed with the result but applied a discretionary/mandatory test to determine the Clerk's official immunity at trial by following *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972).

Thus, although the Seventh Circuit panel split on the appropriate standards to determine the Clerk's entitlement to official immunity, the Seventh Circuit agreed that a factual record must be made before the Clerk's judicial immunity can even be decided.

REASONS FOR GRANTING THE WRIT

THE SEVENTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT DETERMINATION OF THE JUDICIAL IMMUNITY OF THE CLERK OF THE CIRCUIT COURT SHOULD BE MADE AFTER FURTHER DISCOVERY OR TRIAL WHERE IT IS UNDISPUTED THAT THE CLERK PERFORMED JUDICIAL OR QUASI-JUDICIAL FUNCTIONS WITHIN HIS AUTHORITY IN IMPLEMENTING THE WARRANT RECALL PROCEDURES; MOREOVER, THE HOLDING IS IN CONFLICT WITH OTHER CIRCUITS AS WELL AS THE SEVENTH CIRCUIT'S RECENT HOLDING IN *PANKO v. RODAK*[1] AND EFFECTIVELY NEGATES THE DOCTRINE OF QUASI-JUDICIAL IMMUNITY.

The Seventh Circuit erred in ignoring the Clerk of the Court's immunity from damage liability for his actions in a lawsuit brought pursuant to 42 U.S.C. § 1983. *Dieu v. Norton*, 411 F.2d 761 (7th Cir. 1969). The Court wrongfully remanded the case with instructions to the trial court to develop the record on the issue of the Clerk's immunity from damage liability either through discovery or trial. In fact the Seventh Circuit failed to follow the well-established rule in the Seventh Circuit, as well as other circuits, that the Clerk of the Court is cloaked with judicial immunity from damages for acts performed within the scope of his official duties. No dispute exists that the act of implementing reasonable warrant recall procedures is one taken in discharge of the Clerk's official duties. The Seventh Circuit remanded the case without expressing an opinion on this very important bar to the Clerk's liability, thus effectively negating the doctrine of immunity as applied to the Circuit Court Clerk.

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[1] 606 F.2d 168 (7th Cir. 1979).

In *Panko v. Rodak*, 606 F.2d 168, 171 (7th Cir. 1979) *cert. den.* 100 S.Ct. 1034 (1980) the Seventh Circuit recently held:

> The administration and control of the Court's docket are part of the Court's judicial function. And in enforcing the Court's rules, see S.Ct. Rules 39(4) and 53(5), and executing the Court's directives regarding the docketing of cases, . . . , the defendants were carrying out judicial or quasi-judicial functions within their authority. Therefore, the defendants are entitled to judicial immunity from damage liability for their actions. *Brown v. Dunne*, 409 F.2d 341, 343 (7th Cir. 1969).

Similarly, in the instant case, warrant recall orders are unquestionably part of the Court's judicial function. In enforcing and executing the Court orders, the Clerk of the Court clearly carried out judicial and quasi-judicial functions within his authority.

The respondent below merely alleged that the Clerk did not take more care in implementing the pre-existing notification phase of the explicit procedures for recalling the warrant against her. Without dispute, the Clerk instructed his employees about these procedures and specifically attempted to impress upon them the importance of their duties as to warrant recalls. At most, the inadvertent loss of a single warrant recall letter, manifestly does not strip the Clerk of his quasi-judicial immunity.

Recently this Court in *Dennis v. Sparks*, ... U.S. ....., 100 S.Ct. 183, 66 L.Ed.2d 185 (1980), held that while private parties who allegedly bribed a state judge are not protected by the judge's absolute immunity from liability under 42 U.S.C. Sec. 1983, the Court reaffirmed the doctrine of absolute judicial immunity under appropriate circumstances. In *Dennis* this Court cited its

earlier opinion in *Gravel v. United States*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972), for the proposition that a Senator's aide as well as the Senator were immune under the speech or debate clause in those situations where the conduct of the aide would be a protected legislative act if performed by the Senator himself. In judicial immunity cases, this Court reasoned that if the petitioner "was actually performing a judicial act or was *in any sense an official aide of the judge . . . in order that judicial duties may be properly accomplished*" then the judge's absolute immunity would also cloak the petitioner. (Emphasis supplied), *Dennis v. Sparks*, ... U.S. ....., 101 S.Ct. 183, 66 L.Ed.2d 185 (1980).

As the Seventh Circuit recognized in *Panko v. Rodak*, 606 F.2d 168, 171 (7th Cir. 1979) *cert. den.* 100 S.Ct. 1034 (1980), the Clerk of the Court is an official aide of the judge when performing quasi-judicial functions.

Furthermore, the Third, Fourth, Seventh, Eighth and Ninth Circuits have all previously held that Clerks of the Court are protected by judicial immunity. *Lockhart v. Hoenstirne*, 411 F.2d 455 (3d Cir. 1969) *cert. den.* 396 U.S. 941 (1969); *Steinpreis v. Shook*, 377 F.2d 282 (4th Cir. 1967); *Brown v. Dunne*, 409 F.2d 341 (7th Cir. 1969); *Davis v. McAteer*, 431 F.2d 81 (8th Cir. 1970); *Stewart v. Winnick*, 409 F.2d 826 (9th Cir. 1969).

The respondent's contention that the Clerk of the Court is not cloaked with judicial immunity and the Seventh Circuit's view that further facts must be clarified before the Clerk of the Court can be dismissed flies in the face of the Seventh Circuit's own previous decisions that the Clerk of the Court is entitled to judicial immunity at the initial stage of the proceedings. Clearly, the Seventh Circuit erred in remanding the instant cause. The

determination of Clerk Finley's judicial immunity is not a function of "further clarification of the facts." Far from being "premature," immunity is a threshold issue. No more facts are necessary for the court to determine that the petitioner is cloaked with immunity.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

AMENDED OPINION

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80-1035

TONI MURRAY,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79 C 1176—**Julius J. Hoffman**, *Judge.*

ARGUED SEPTEMBER 8, 1980—DECIDED NOVEMBER 25, 1980
OPINION AMENDED MARCH 11, 1981

Before SWYGERT and SPRECHER, *Circuit Judges*, and DUMBAULD,* *Senior District Judge.*

DUMBAULD, *Senior District Judge.* Appellant in the case at bar was the victim of a theft, and then of a deprivation of her constitutional rights by reason of arrest without a valid warrant. Her complaint under 42 U.S.C. 1983[1] was dismissed by the District Court as to

* The Honorable Edward Dumbauld, Senior District Judge of the United States District Court for the Western District of Pennsylvania, sitting by designation.

[1] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory, subjects, or causes to be subjected, any citizen of the United States or

(Footnote continued on following page)

certain defendants, and summary judgment granted in favor of another defendant. The circumstances are as follows:

Appellant's purse and checkbook were stolen. The theft was reported to the police. Six to twelve months later, some of the stolen checks were cashed at various retail stores.[2] Presumably on complaints made by the stores, appellant was arrested on charges of deceptive practices and at a hearing on November 4, 1974, before Branch 68 of the Circuit Court of Cook County all complaints against her were dismissed except one which was continued until December 9, 1974. Being under the impression that all charges had been dismissed, she did not appear on December 9, 1974, and a warrant was issued for her arrest. On January 13, 1975, appellant, having learned of the warrant, appeared in Branch 68, and the warrant of December 9 was quashed and recalled by the court. On February 10, 1975, the single complaint remaining against appellant was dismissed.

Then on March 25, 1975, several months after the warrant of December 9, 1974, had been quashed, appellant was arrested at her home by two Chicago police officers, pursuant to the invalid warrant.

Although she explained to the officers that the warrant had been recalled, she was taken to headquarters, forced to strip naked and submit to searches conducted and observed by Chicago police officers. After subsequently being imprisoned for six or seven hours, she was released, and after again appearing before Branch 68 on April 10, 1975, was discharged. Following

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[1] *continued*
other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] Presumably the checks may have had her name printed on them, and the thief knew whose name to forge. It does not appear whether the forged checks exceeded her balance or were rejected by the bank as forgeries.

her release from police custody she received medical treatment and was hospitalized for five days.

Appellant's complaint named as defendants: (1) the City of Chicago; (2) James T. Rochford, Superintendent of the Chicago Police Department at the time of the events described above; (3) his successor in office, James O'Grady; (4) the arresting officers Pappas and Ziemke; and (5) Morgan M. Finley, Clerk of the Circuit Court of Cook County, Illinois.

The District Court granted motions to dismiss as to the city, relying on *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 690-91 (1978), for requirement of a showing of policy or custom; and as to Rochford and O'Grady on the ground of lack of personal participation; and as to the arresting officers on the ground that the warrant appeared on its face to be valid, relying on *Baker v. McCollan*, 443 U.S. 137, 143-46 (1979). As to Finley, summary judgment was granted on the ground that affidavits showed that Finley's procedures were satisfactory and adequate.

However, affidavits merely showed that the clerk's office personnel were aware of the importance of promptly transmitting warrant recalls and that they were to be transmitted to the police on the same day; and that the order in plaintiff's case was deposited in a location similar to an "out basket," but the affiant did not know what happened to it thereafter. The affidavits did not show how the documents were handled from that point to the police department, whether by mail or by hand delivery. The affidavits submitted by the police department simply stated that examination of the book in which such items should have been listed failed to disclose any record of the recall of the warrant in appellant's case.

It seems clear that appellant sustained a violation of constitutional rights by being arrested and detained pursuant to an invalid warrant. The defendants should not be permitted to "get off the hook" by merely pointing the finger at each other. Someone is surely at fault for failing to establish or execute appropriate

procedures for preventing such serious malfunctionings in the administration of justice. Plaintiff should be entitled to discovery in order to determine who is the true culprit responsible for the wrong done her.[3] It would be premature to deny appellant relief at the present stage of the case, in advance of discovery or trial. Summary judgment should not be granted unless it is clear that upon no conceivable state of facts as shown by the proof could a plaintiff recover. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962).

In the case at bar, as to the city, it is possible that existence of a policy, custom, or practice might be established. If plaintiff succeeds in proving her allegation that similar unwarranted arrests have occurred frequently, to the knowlege of the parties involved, it might be possible to show dereliction of duty of constitutional dimension upon the part of the responsible officials.[4]

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[3] Defendants argue that appellant could have been more diligent in seeking discovery during the period between filing of the complaint and granting of summary judgment. But it is common practice for lawyers to defer discovery until after determination of motions which might make discovery otiose by disposing of the case upon controlling questions of law. Or discovery *in limine* may sometimes appropriately be limited to jurisdictional questions. *Fraley v. C.&.O. Ry. Co.*, 397 F. 2d 1, 4 (3rd Cir. 1968).

[4] It is highly probable that in due time O'Grady, a mesne holder of the position of Superintendent of Police, will be dismissed, as his actions have had no causative impact upon appellant. Her request for equitable future relief and supervision by a federal court of the office management methods of the state officials involved is of questionable validity. See *Rizzo v. Goode*, 423 U.S. 362, 378-80 (1976). However, even though the case at bar is not a class action, there is a growing trend toward granting "structural" relief and we express no opinion as to its propriety here. See Chayes, "The Role of the Judge in Public Law Litigation," 89 Harv. L.R. (May, 1976) 1281, 1309; Cox, The Role of the Supreme Court in American Government (1976) 88-98.

It is quite possible that the clerk of court, Finley, will also ultimately be dismissed if by amplified clarification of his

(Footnote continued on following page)

With respect to the arresting officers themselves, good faith action under apparently valid authority is an affirmative defense which they must plead and prove. *Pierson v. Ray*, 386 U.S. 547, 557 (1967). But see *Joseph v. Rowlen*, 402 F. 2d 367, 370 (7th Cir. 1968).

It was error for the District Court to rely upon *Baker v. McCollan*, 443 U.S. 137, 143 (1979), as a basis for dismissing the action against the arresting officers. In that case there was a valid warrant. It merely named the wrong suspect, a defect similar to *idem sonans*.[5]

The judgment of the District Court is reversed and the case remanded for trial. Circuit Rule 18 shall apply.

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[4] *continued*
procedures, he is able to establish that the methods used to convey recall orders to the police department are appropriate and adequate. See *Schnell v. City of Chicago*, 407 F. 2d 1084, 1086 (7th Cir. 1969).

Mere negligence, of course, will not support a § 1983 action against Finley. See *Bonner v. Coughlin*, 545 F. 2d 565, 568 (7th Cir. 1976). Moreover, pending further clarification of the facts it would be premature to consider whether Finley is entitled to the defense of official immunity. See *Dieu v. Norton*, 411 F. 2d 761, 763 (7th Cir. 1969).

[5] The warrant erroneously named Linnie, not Leonard McCollan.

SWYGERT, *Circuit Judge*, concurring.* Although I agree with the result announced in the majority opinion, I disagree with the implication in footnote 4 that plaintiff must prove that defendant Finley's actions were intentional or reckless. The majority states that mere negligence will not support a § 1983 action against Finley, *Bonner v. Coughlin*, 545 F.2d 565, 568 (7th Cir. 1976). While this standard applies in many factual situations, the majority fails to note that some official duties are mandatory. *McCray v. Maryland*, 456 F.2d 1, 5 (4th Cir. 1972).

In *McCray*, plaintiff alleged that the court clerk impeded the filing of certain papers. The court held that where an official fails to follow a court order or acts in violation of his statutory duties, "no immunity [is] recognized and the officer [is] held liable under section 1983 if his actions abridged an individual's federally protected rights." 456 F.2d at 5.[1]

I believe that if plaintiff shows at trial that Finley had a mandatory duty to execute the court's order to recall the arrest warrant, then she does not have to prove that his failure to do so was intentional or reckless. Further, if it is shown that Finley's duty to execute warrant recalls is ministerial rather than discretionary, he would

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* An amended opinion was issued on March 11, 1981 reflecting certain changes in footnote 4 appearing on pages 4-5. This concurring opinion was filed in response to those changes.

Chief Judge Fairchild and Judge Cudahy voted to deny rehearing *en banc*. Their votes are predicated upon the view expressed in Judge Swygert's concurring opinion.

[1] The court went on to note that when an official acts in violation of duties imposed upon him by law, he is "entitled to no more protection than any other state ministerial functionary who fails to discharge a mandatory duty." 456 F. 2d at 5 (citing *Whirl v. Kern*, 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969)).

not be entitled to immunity.[2] *McCray v. Maryland, supra*, 456 F.2d at 4; *Norwood v. Soloman*, 431 F. Supp. 380 (E.D. Mo. 1977).

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[2] The Fourth Circuit explained the rationale for distinguishing between ministerial and discretionary duties in considering whether immunity is applicable:

> The immunity of "quasi-judicial" officers . . . derives, not from their formal association with the judicial process, but from the fact that they exercise a discretion similar to that exercised by judges. Like judges, they require the insulation of absolute immunity to assure the courageous exercise of their discretionary duties. Where an official is not called upon to exercise judicial or quasi-judicial discretion, courts have properly refused to extend him the protection of absolute judicial immunity . . . .

456 F.2d at 4.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TONI MURRAY,

Plaintiff,

No. 79 C 1176 v.

THE CITY OF CHICAGO, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable JULIUS J. HOFFMAN, Senior Judge of said court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, November 30, 1979, commencing at the hour of 10:00 a.m.

APPEARANCES:

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on behalf of Defendants City of Chicago, John Ziemke, Theodore Pappas, James Rochford and James O'Grady;

HON. WILLIAM J. SCOTT
2650 South California Avenue, Room 14-C
Chicago, Illinois 60630
BY: MS. ELLEN G. ROBINSON
on behalf of Defendant Morgan Finley.

THE CLERK: 79 C 1176, Toni Murray v. The City of Chicago, et al.; for ruling, motion of the defendants to dismiss the complaint or, in the alternative, for summary judgment.

THE COURT: Good morning.

MS. ROBINSON: Good morning, your Honor. Ellen Robinson, Assistant State's Attorney, on behalf of the defendant Morgan Finley.

MS. DUNCAN-BRICE: Good morning, your Honor. Jennifer Duncan-Brice on behalf of the defendants Ziemke, Pappas, Rochford, O'Grady and The City of Chicago.

MR. SCHLAM: Good morning, your Honor. I am Lawrence Schlam on behalf of the plaintiff in this cause.

THE COURT: I have this case here for ruling on the motions of the defendants to dismiss the complaint or, in the alternative, for summary judgment.

This is an action brought pursuant to 28 U.S.C. Section 1331 and 1343 and under 42 U.S.C. Sections 1983, 1985, 1986 and 1988, to recover for the alleged deprivations of the plaintiff's civil rights by the six named defendants.

According to the complaint, the plaintiff was arrested in 1974 as the result of certain of her checks appearing and being unlawfully cashed at various retail stores. The plaintiff asserts that her purse and checkbook had been stolen earlier in the year.

On November 4, 1974, the plaintiff appeared in the Circuit Court of Cook County to answer the charges filed against her. At that hearing all but one of the complaints filed against her were dismissed. However, it is asserted in the complaint that the plaintiff was under the reasonable belief that all charges had been dismissed on that day so that the plaintiff failed to appear

at the next hearing on December 9, 1975. That failure to attend resulted in an arrest warrant being issued for the plaintiff. It is that warrant which is the subject matter of this action.

The plaintiff alleges that she learned of the new arrest warrant and appeared of her own volition on January 13, 1975. On that day the arrest warrant was quashed and recalled by the Court.

On February 10, 1975, the case was dismissed against the plaintiff. Notwithstanding the fact that the plaintiff's case had been dismissed and the fact that the arrest warrant had been judicially recalled on January 13, 1975, the plaintiff alleges that she was arrested on March 25, 1975, pursuant to that judicially-recalled arrest warrant.

The plaintiff was subsequently taken to a police station where she was subjected to a strip search and was incarcerated for six to seven hours. The plaintiff alleges that she was then required again to appear in the Circuit Court of Cook County on April 10, 1975, to answer charges that were nonexistent as there were no warrants outstanding against her. The plaintiff further asserts that she suffered severe emotional and physical injuries as the result of the unlawful arrest and detention.

The plaintiff seeks both monetary and injunctive relief against all of the defendants. Those defendants are: The City of Chicago; James T. Rochford, the then Superintendent of the Chicago Police Department; James O'Grady, Superintendent Rochford's successor; John Ziemke and Theodore Pappas, the police officers who effectuated the arrest of the plaintiff on March 25, 1975; and Morgan M. Finley, Clerk of the Circuit Court of Cook County.

All six of the defendants have filed motions to dismiss the complaint or, in the alternative, for summary judgment.

Numerous grounds are asserted by the defendants and each of the motions for summary judgment is accompanied by affidavits. The plaintiff has filed no af-

fidavits in opposition to the motions for summary judgment.

The Court will treat each of the defendants' motions individually and, where appropriate, will consider the motions to dismiss without consideration of any supporting documents. Wholesale Auto Supply Company v. Hickok Manufacturing Company, 221 Federal Supplement 935, Eastern District of New Jersey, 1963.

Dealing first with the motion of the defendant City of Chicago to dismiss the complaint, the Court observes that the plaintiff asserts liability on the part of the City of Chicago on the basis that its control of the ministerial functions of the Chicago Police Department requires the City to promulgate warrant recall procedures that will prevent invalid arrests such as is alleged to have occurred here. The plaintiff asserts that the present procedure for the recall of warrants is unconstitutional as it results in the arrest of innocent individuals. Accordingly, the plaintiff alleges that the defendant City of Chicago is liable to the plaintiff for her invalid and allegedly unconstitutional arrest pursuant to a judicially-recalled arrest warrant.

The City of Chicago seeks the dismissal of this complaint as to it primarily on the ground that, as a municipality, it cannot be held liable for the alleged constitutional violations of its subordinates under a theory of respondeat superior. The defendant recognizes changes in the law of Section 1983 liability that will render a municipality liable under certain circumstances, but asserts that the plaintiff's complaint does not present the Court with such a situation. This Court agrees with the defendant City of Chicago and finds that the complaint must be dismissed as to this defendant.

Until recently, municipal entities were immune from suit under 42 U.S.C., Section 1983. Monroe v. Pape, 365 United States 167, 1961.

However, the Supreme Court decision of Monell v. Department of Social Services of the City of New York, 436 United States 658, 1978, removed the absolute immunity previously afforded to municipalities and their

agencies and held that in certain circumstances, municipalities may be amenable to suit under 42 U.S.C., Section 1983.

After a lengthy discussion of the history of the civil rights statutes, the Supreme Court specifically held in that case that the doctrine of respondeat superior has no application to alleged violations of 42 U.S.C., Section 1983. The Court did hold, however, that a municipality may be held liable for such violations if it is clear that:

> "the action that is alleged to be unconstitutional implements a policy statement, ordinance, regulation or decision officially adopted or promulgated by that body's officers."

Monell v. Department of Social Services of the City of New York, 436 United States 658 at 690.

The Court further stated that liability will only be imposed if such a specific policy is alleged to exist and that policy causes an employee of the municipality to violate the constitutional rights of another. The Monell decision is clearly distinguishable from the present controversy.

In that decision, the Supreme Court was faced with a policy of the City of New York that compelled pregnant female employees to take unpaid leaves of absence. Such a policy required municipal employees to compel their female subordinates to take those unpaid leaves of absence. Accordingly, the Supreme Court held that such a policy of the municipality could be said to cause a violation of the plaintiffs' civil rights within the meaning of 42 U.S.C., Section 1983.

Such a policy and resulting causation does not appear from the plaintiff's complaint in this action. Not only has the plaintiff failed to specifically allege what the current warrant recall procedure of The City of Chicago is; she also fails to specifically allege facts showing that the policy requires a subordinate municipal employee to violate a citizen's civil rights. Absent such specific allegations, the policy cannot be said to cause the alleged constitutional violation and the complaint must be dismissed as to The City of Chicago. Jamison v. McCurrie,

565 F.2d 483, Seventh Circuit, 1977 and McDonald v. State of Illinois, 557 F.2d, Seventh Circuit, 1977.

Although the plaintiff has clearly attempted to draw her complaint in order to present the Court with a case within the limited perimeters of the Monell decision, the Court must conclude that the plaintiff alleges only a theory of vicarious liability under the doctrine of respondeat superior as to The City of Chicago. The plaintiff is asserting that the employer City must be held liable for the alleged constitutional torts of its employees based on the City's control over the warrant recall procedure.

The mere right to control without any control or direction having been exercised is not enough to support Section 1983 liability. Rizzo v. Goode, 423 United States 362, 1976.

Accordingly, since liability under 42 U.S.C., Section 1983 and 28 U.S.C., Section 1931 cannot be founded upon such a theory, the complaint must be dismissed as to The City of Chicago for failure to state a claim upon which relief may be granted. Hampton v. City of Chicago, 484 F.2d 602, Seventh Circuit, 1973, certiorari denied, 415 United States 917, 1974, and Gresham v. City of Chicago, 405 Federal Supplement 410, Northern District of Illinois, 1974.

We deal next with the motions of the defendants Rochford and O'Grady to dismiss the complaint.

Three of the remaining five defendants are named as defendants in this complaint in their official capacities as local or state government officials. The defendants Rochford and O'Grady are being sued in their capacity as the past superintendents of the Chicago Police Department. The defendant Finley is named as a defendant in his capacity as the Clerk of the Circuit Court of Cook County. Because the liability of the defendants Rochford and O'Grady will rest upon the same considerations, the Court will determine those defendants' motions to dismiss together. The liability of the defendant Finley will be examined later.

In her complaint, the plaintiff asserts that the defendants Rochford and O'Grady have the duty to enforce and supervise the warrant recall procedures of the Chicago Police Department. The plaintiff alleges that the defendants' failure to properly implement and control existing recall procedures resulted in the arrest of the plaintiff, which is the subject matter of this lawsuit.

Each of the defendants has moved to dismiss the complaint for failure to state a claim upon which relief may be granted. Although several grounds are asserted by the defendants, the primary ground relied upon by each is that they cannot be held liable for the alleged constitutional violations of their subordinates. Each of the defendants refer the Court to the well-established rule that Government officials cannot be found liable under the doctrine of respondeat superior.

It is clear from a review of the plaintiff's complaint that the defendants' positions are well-taken and that the complaint must be dismissed as to these defendants as well.

In holding that a municipal entity may be held liable under 42 U.S.C., Section 1983 in certain circumstances, the Supreme Court in Monell also made it clear that:

> "Local Government officials sued in their official capacities are 'persons' under Section 1983 in those cases in which a local government would be suable in its own name."

Monell at 690, Note 55.

Since the Court has previously determined that the present action does not fall within the perimeters of that decision, the Court must find another basis for imposing liability upon these two supervisory defendants from the allegations of the plaintiff's complaint. Absent such circumstances as existed in the Monell decision, the Court must conclude that the defendants may only be held liable if it is clear from the allegations of the complaint that these defendants were involved personally in the incidents giving rise to this cause of action. Adams v. Pate, 445 F.2d 105, Seventh Circuit, 1971.

The allegations of the complaint as to these two defendants are devoid of any specific facts asserting their personal knowledge of the alleged unconstitutional acts of their subordinates or their acquiescence in them. Cochran v. Rowe, 438 Federal Supplement 566, Northern District of Illinois, 1977.

Indeed, it is only asserted that these defendants knew of the "illegality of the procedures, regulations and customers regarding the recall of arrest warrants and negligently, willfully, and wantonly caused them to occur and to continue and took and continued to take no measures to prevent them."

Such conclusory allegations are insufficient to support any liability on the part of the defendants Rochford and O'Grady. Perry v. Elrod, 436 Federal Supplement 229, Northern District of Illinois, 1977.

It is personal involvement that is the touchstone of Section 1983 liability. Sanders v. Daley, 306 Federal Supplement 277, Northern District of Illinois, 1969.

It is clear that a supervisory policy official can be held liable for damages under 42 U.S.C., Section 1983 for his own personal negligent or willful conduct that is the proximate result of a civil rights violation. Schnell v. City of Chicago, 407 F.2d 1084, Seventh Circuit, 1969; Moon v. Winfield, 368 Federal Supplement 843, Northern District of Illinois, 1973.

However, it is equally clear that there must be an affirmative link between the alleged incidents of subordinate misconduct and the supervisory approval or acquiescence in such misconduct. Rizzo v. Goode, 423 United States 362, 1976.

The allegations of the complaint contain no specific facts asserting the existence of such an affirmative link.

The plaintiff's allegations are directed only to the defendants' duties as Superintendents of Police for the City of Chicago. There are no allegations that these defendants were aware of the plaintiff's situation and negligently or willfully failed to act. Moon v. Winfield, to which I have previously alluded.

Neither does the complaint contain any allegations that these defendants had been confronted with similar specific situations in the past. The plaintiff's abstract assertion that one or another constitutional right has been violated does not require the Court to determine that a claim has been adequately pleaded. Shakman v. Democratic Organization of Cook County, 435 F.2d 267, Seventh Circuit, 1970.

On the basis of the plaintiff's clearly conclusory allegations as to the defendants' knowledge of these acts and in the absence of specific allegations of facts revealing the relationship between the defendants Rochford and O'Grady and the alleged constitutional violations of their subordinates, this complaint fails to state a claim against these defendants. Saunders v. Cahill, 359 Federal Supplement 79, Northern District of Illinois, 1973; Huey v. Barloga, 277 Federal Supplement 864, Northern District of Illinois, 1967.

There is no basis from which the Court may construe the requisite personal involvement of the defendants Rochford and O'Grady from the facts as alleged in this complaint. Joseph v. Brierton, 431 Federal Supplement 50, Northern District of Illinois, 1976; Grillo v. Sielaff, 414 Federal Supplement 272, Northern District of Illinois, 1976.

Accordingly, the complaint must be dismissed against the defendants Rochford and O'Grady for failure to state a claim upon which relief may be granted.

We deal next with the defendant Finley's motion for summary judgment.

The defendant Finley's liability is asserted to rest upon his duty, as Clerk of the Circuit Court of Cook County, to establish and correct procedures for the notification of the Chicago Police Department of those arrest warrants which have been recalled by judicial order. The plaintiff asserts that the defendant Finley's failure to implement proper warrant recall procedures resulted in the arrest of the plaintiff in this action.

As the Court noted previously, the defendant has presented alternative motions to dismiss the complaint and

for summary judgment. When such motions are brought in the alternative, the Court is justified in treating each separately and the matters outside the pleadings that have been filed in support of the motion for summary judgment may properly be considered. Wholesale Auto Supply Company v. Hickok Manufacturing, to which I have previously alluded.

In the case at bar, the Court elects to first consider the defendant Finley's motion for summary judgment.

It is well-established that summary judgment is appropriate only where there are no genuine issues of material fact and the movant demonstrates that he is entitled to judgment as a matter of law. Carter v. Stanton, 405 United States 669, 1972; Butler v. Goldblatt Brothers, Incorporated, 432 Federal Supplement 1122, Northern District of Illinois, 1977.

Based upon the affidavits and documents filed by the defendant in support of his motion for summary judgment, it is clear that this is an appropriate case for the entry of an order granting summary judgment in favor of the defendant Finley and against the plaintiff.

In support of his motion for summary judgment, the defendant has filed a memorandum of the Clerk of the Circuit Court and an excerpt from the operating manual of the Clerk's office, both of which describe the warrant recall procedures that were in effect at the time of the alleged occurrences giving rise to this complaint. The defendant has also filed the affidavits of one Robert Grossman, the Chief Deputy Clerk of the Criminal Division of the Circuit Court of Cook County, and one Maurice McNicholas, the Deputy Clerk who was responsible for the recall of arrest warrants on the date that the warrant at issue herein was recalled by judicial order.

The plaintiff has filed no affidavits in opposition to those filed by the defendant Finley. Accordingly, the facts contained therein are to be taken as true and are uncontroverted for the purpose of this motion. Wang v. ..... Maxinhall Estates, Incorporated, 531 F.2d 832, Seventh Circuit, 1976; DeMert and Dougherty, Incorporated v. Chesebrough Ponds, Incorporated, 348

Federal Supplement 1194, Northern District of Illinois, 1972.

A careful examination of the procedures in effect at the time of the alleged occurrences, as shown by the documents and affidavits filed by the defendant Finley, shows that the warrant recall procedure of the Circuit Court of Cook County are more than adequate to satisfy constitutional requirements. Deputy Clerks are instructed to effectuate the notification of the Chicago Police Department of the recall of an arrest warrant on the same day that the judicial recall is entered. All personnel are aware of the serious consequences of a failure to so notify the Police Department in a timely manner. Several copies of the orders are filed with the Police Department and with the Clerk's office as well as being placed in the official court file.

In the absence of any specific challenges to these procedures, the Court would be unable to find that these procedures are unconstitutional. Rogers v. Provident Hospital, 241 Federal Supplement 633, Northern District of Illinois, 1965.

The plaintiff alleges only that the defendant Finley and his subordinates "did not fulfill their constitutional duty to communicate in a reasonable manner" the fact that a judicial order of recall had been entered. Such allegations are totally conclusory and fail to allege with specificity how the warrant recall procedure is unconstitutional on its face or how an unconstitutional act occurred as the proximate result of its application and practice as to this plaintiff. Shakman v. Democratic Organization of Cook County, to which I have previously referred.

In the absence of such specific allegations, the Court must conclude that the warrant recall procedures of the Circuit Court of Cook County are unconstitutional as applied to the allegations of the plaintiff's complaint. See Askew v. Bloemker, 548 F.2d 674, Seventh Circuit, 1973; Ashwell Company v. Transamerica Insurance Company, 407 F.2d 762, Seventh Circuit, 1969.

Furthermore, the affidavit of Maurice McNicholas and Exhibit B filed by the plaintiff show that the procedures outlined previously were followed as to the plaintiff's arrest warrant. At best, it can only be said that if the Police Department did not receive notice of the recall, the subsequent arrest of the plaintiff was the result of inadvertence or accident. Such circumstances cannot give rise to an action under 42 U.S.C., Section 1983. Little v. Walker, 552 F.2d 193, Seventh Circuit, 1977; Bonner v. Coughlin, 545 F.2d 565, Seventh Circuit 1976.

The documents and affidavits filed by the defendant show clearly that there is no genuine issue of fact that is undisputed. The purpose of a motion for summary judgment is to eliminate the necessity of a trial that can only result in needless expense and delay. Kirk v. Home Indemnity Company, 431 F.2d 554, Seventh Circuit, 1970.

The granting of a motion for summary judgment is a drastic remedy, but is also one that should be applied in appropriate circumstances. Mintz v. Mathers Fund, Incorporated, 463 F.2d 495, Seventh Circuit, 1972.

In light of the uncontradicted documents and affidavits of the defendant, it is clear that this is such a case. The Corut is unable to determine that any genuine issue of material fact exists in this case that would result in any judgment other than one for the defendant. Kiess v. Eason, 442 F.2d 712, Seventh Circuit, 1971.

Accordingly, the Court must allow the defendant Finley's motion for summary judgment and need not consider his alternative motion to dismiss the complaint.

We deal next with the motion of the defendants Pappas and Ziemke to dismiss the complaint.

The two remaining defendants are the only two defendants who are asserted to have been personally involved in the alleged unconstitutional arrest of the plaintiff. These defendants, police officers Pappas and Ziemke, were allegedly the officers who actually effectuated the arrest of the plaintiff pursuant to the judicially-recall warrant.

The plaintiff asserts that these defendants knew or should have known by reasonable inquiry that the warrant for the plaintiff's arrest had been recalled and that the subsequent arrest was illegal and without probable cause. The plaintiff asserts that despite her protests and explanation of the circumstances, the defendants Pappas and Ziemke "negligently, willfully and wantonly" arrested the plaintiff and incarcerated her for a period of six to seven hours.

The defendant Pappas and Ziemke have jointed filed motions to dismiss or, in the alternative, for summary judgment. The grounds asserted by these defendants primarily involve their good faith in effectuating the arrest of the plaintiff and the fact that they did not make sufficient inquiries into the validity of the outstanding warrant. Affidavits have been attached to the motions for summary judgment which recite their allegations of good faith and the steps they took to verify the arrest warrant. However, the defense of good faith can rarely be properly determined from affidavits and would be inappropriate in the circumstances of this case. Foster v. Zeeko, 540 F.2d 1310, Seventh Circuit, 1976; Alvarez v. Wilson, 431 Federal Supplement 136, Northern District of Illinois, 1977.

However, such a determination need not be made in this case as it is clear to the Court that the plaintiff has failed to plead a claim upon which relief may be granted and the complaint must be dismissed as to the defendants Pappas and Ziemke.

It is axiomatic that the threshold inquiry in any action seeking to redress alleged constitutional violations, whether under 42 U.S.C., Section 1983 or 28 U.S.C., Section 1331, must be whether, in fact, a claim of constitutional magnitude has been properly alleged. Butz v. Economu, 438 United States 478, 1978; Paul v. Davis, 424 United States 693, 1976.

It is this threshold requirement that the plaintiff has failed to satisfy in the allegations of her complaint.

Notwithstanding this Court's determination of the motions of the other defendants in this action on other

grounds, it is now necessary to analyze the plaintiff's complaint in terms of whether a cognizable claim under 42 U.S.C., Section 1983 has been pleaded. The question of supervisory liability and the application of the doctrine of respondeat superior is totally separate from considerations of whether a claim has been substantively pleaded. The existence of vicarious liability is similar to the principles of immunity and a finding of nonliability warrants the Court to proceed no further in its inquiry into the existence of a constitutional claim. Dieu v. Norton, 411 F.2d 761, Seventh Circuit, 1969; Peckham v. Scanlon, 241 F.2d 761, Seventh Circuit, 1957.

However, the liability asserted to exist against these defendants is personal in nature and the Court must determine whether a claim has been pleaded properly in order to invoke Section 1983 liability.

The Court finds the present case to be governed by the recent Supreme Court decision of Baker v. McCollan, No. 78-752, decided June 26, 1979. That decision is indistinguishable from the facts alleged in the plaintiff's complaint. In Baker, the plaintiff was arrested and incarcerated for several days pursuant to an arrest warrant that was intended for his brother, but which contained the plaintiff's name on its face. That warrant was no more invalid than the one alleged to exist in this action. Both warrants were valid on their face and in each situation there was an arrest pursuant to the warrant.

In Baker, as is alleged to have occurred here, there were continued protests of the plaintiff that the arrest was improper. The period of incarceration in Baker was several days; in this action, the time spent in custody amounted to only a few hours. On such similar facts, the Court must find the recent decision of Baker v. McCollan to be controlling.

The Supreme Court held that the plaintiff had failed to satisfy the threshold requirement of a finding that he had been deprived of a right "secured by the Constitution and laws" within the 42 U.S.C., Section 1983. The

Court held that the plaintiff had been deprived of his liberty for a period of days, but that such incarceration was pursuant to an arrest warrant that conformed to the requirements of the Fourth Amendment. The Court recognized that mere detention pursuant to a valid warrant will, after a certain period of time and in the face of repeated protests, deprive an individual of "liberty without due process of law." However, the Court concluded, and this Court is in full agreement, that a detention of several days cannot amount to such a deprivation of liberty. It is clear that a detention of six to seven hours, also pursuant to a warrant conforming to Fourth Amendment requirements, cannot amount to a deprivation of civil rights under the Constitution.

It is now well-settled that not every allegedly invalid arrest or imprisonment can give rise to a cause of action under 42 U.S.C., Section 1983. That section of the Civil Rights Act was never meant to be a fount of federal tort law. Paul v. Davis, to which I have previously referred.

While a claim for unlawful arrest and detention may be properly brought under Section 1983, Joseph v. Rowlen, 402 F.2d 367, Seventh Circuit, 1968, the Court must find that on the facts as alleged in the plaintiff's complaint against the defendants Pappas and Ziemke, there has been no unlawful arrest and detention of constitutional magnitude and the plaintiff's claim is not cognizable under 42 U.S.C., Section 1983.

While it appears that a possible State tort claim may lie under the circumstances of the plaintiff's complaint, no violation of the plaintiff's civil rights has been properly pleaded. Estelle v. Gamble, 429 United States 97, 1978; Brainerd v. Potratz, 421 Federal Supplement 836, Northern District of Illinois, 1976.

Accordingly, the defendants' motion to dismiss the complaint for failure to state a claim upon which relief may be granted must be allowed. The plaintiff can prove no set of facts that would entitle her to relief under 42 U.S.C., Section 1983 or 28 U.S.C., Section 1331. Burns v. Paddock, 530 F.2d 18, Seventh Circuit,

1974; Grillo v. Sielaff, 414 Federal Supplement 272, Northern District of Illinois, 1976.

Finally, the Court notes that a seventh defendant has been named by the plaintiff in this action. That defendant, Police Officer Meyers, has never been served with summons and complaint. The service of summons was returned unexecuted on April 2, 1979.

The Court also notes that the plaintiff's memoranda filed in this action in opposition to the various motions to dismiss are devoid of any reference to that defendant. Since more than six months have elapsed since this complaint was filed on March 23, 1979, the Court will enter an order dismissing the defendant Meyers from this action pursuant to the provisions of Rule 21 of the General Rules for the Northern District of Illinois for want of prosecution.

Accordingly, Miss Clerk, the motions of The City of Chicago, James T. Rochford, James O'Grady, John Ziemke and Theodore Pappas to dismiss the complaint for failure to state a claim upon which relief may be granted are allowed. The motion of the defendant Morgan M. Finley for summary judgment is also allowed. The defendant Meyers is dismissed from this action for want of prosecution. This complaint is hereby dismissed with prejudice and no costs as to the defendants City of Chicago, James T. Rochford, James O'Grady, John Ziemke and Theodore Pappas. Judgment is hereby entered in favor of the defendant Finley and against the plaintiff Toni Murray.

MS. DUNCAN-BRICE: Thank you very much, your Honor.

MS. ROBINSON: Thank you, your Honor.

MR. SCHLAM: Thank you, your Honor.

(WHICH were all the proceedings had and taken on the day and date aforesaid in the above-entitled cause.)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

March 31, 1980

Before

Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. EDWARD DUMBAULD, Senior District Judge*

TONI MURRAY,

Plaintiff-Appellant,

No. 80-1035 vs. On Petition for Rehearing

CITY OF CHICAGO, et al.,

Defendants-Appellees.

ORDER

On consideration of the petition for rehearing and suggestions for rehearing *en banc* filed in the above-entitled cause by defendants-appellants, no judge in active service having voted to grant the petition for rehearing *en banc*, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* The Honorable Edward Dumbauld, United States Senior District Judge for the District of Pennsylvania, sitting by designation.

Office - Supreme Court, U.S.
FILED
JAN 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 80-2205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois,

Petitioner,

vs.

TONI MURRAY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

PETITION FOR CERTIORARI FILED JUNE 29, 1981
CERTIORARI GRANTED NOVEMBER 2, 1981

In The

Supreme Court of the United States

October Term, 1980

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois,

Petitioner,

vs.

TONI MURRAY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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JOINT APPENDIX

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The opinion of the Seventh Circuit Court of Appeals is reported at 634 F.2d 365 (7th Cir. 1981) and is included in the Petition for Certiorari as Appendix A, pages 1a through 7a.

The District Court's ruling appears in the Petition for Certiorari as Appendix B, pages 8a through 23a.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 23, 1979—

Plaintiff's Complaint filed in the United States District Court for the Northern District of Illinois, Eastern Division.

April 16, 1979—

City of Chicago Defendants' Motion to Dismiss filed.

April 26, 1979—

Defendant Finley's Motion to Dismiss or, In the Alternative, for Summary Judgment filed.

November 30, 1979—

Order entered granting Defendant Finley's Motion for Summary Judgment and granting the City of Chicago Defendants' Motions to Dismiss.

December 28, 1979—

Plaintiff-Appellant filed Notice of Appeal.

November 25, 1980—

Opinion and Judgment of the Court of Appeals for the Seventh Circuit.

March 11, 1981—

Amended Opinion issued by the Court of Appeals for the Seventh Circuit.

March 31, 1981—

Defendant-Appellee Finley's Petition for Rehearing En Banc denied by the Court of Appeals for the Seventh Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Filed March 23, 1979)

TONI MURRAY,

Plaintiff,

v.

CITY OF CHICAGO, an Illinois municipal corporation, JAMES T. ROCHFORD, former Superintendent of the Chicago Police Department, JAMES O'GRADY, Superintendent of the Chicago Police Department, Chicago Police Officers J. ZIEMKE (#2303), T. PAPPAS (#3457), Sgt. MEYERS, (#967), Other Presently Unknown Supervisors of the Chicago Police Department Warrant Execution and Recall Data and Operations Systems, and MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois, and Other Presently Unknown Agents of said Clerk employed by him at times and places relevant to the occurrences alleged herein, all Individually and in Their Official Capacities,

Defendants.

No. 79 C 1176—Civil Action For Damages
And Injunctive Relief—Jury Demanded

COMPLAINT

Plaintiff TONI MURRAY, by her attorneys LAWRENCE SCHLAM and HARVEY L. WALNER & ASSOCS., LTD., complains of defendants as follows:

JURISDICTION

1. This civil action seeks damages and other relief for actions of defendants under color of state laws, regulations, and customs, which denied to plaintiff established liberties and rights under the Constitution and laws of Illinois and of the United States. Specifically, jurisdiction is here invoked pursuant to the Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution, the provisions of Title 28 U.S.C. Sec. 1331 and 1343, and of Title 42 U.S.C. Sec. 1983, 1985, 1986 and 1988. This claim exceeds TEN THOUSAND DOLLARS ($10,000.00).

2. Notice of claim, required by Ch. 85 *Ill.Rev.Stat.* Sec. 8-102, has been timely served; a copy of said notice is attached (Exhibit "A").

PARTIES

3. Plaintiff MURRAY is and, at all relevant times, was a citizen of the United States and of Illinois and a resident of Chicago, Illinois. She was at, all pertinent times, acting lawfully, responsibly and with due care for her safety and for the preservation of her legal rights.

4. Defendant City of Chicago (hereinafter "CITY") is an Illinois municipal corporation. At all times, pertinent to this Complaint, the CITY was, of necessity, acting by and through ROCHFORD and their other employee-agents who are defendants herein. ROCHFORD, and his fellow servant CITY police defendants, had and continue to have the duty to perform the ministerial function of local law enforcement for the defendant CITY.

Included in this ministerial duty, of course, is the duty to enforce the laws of the United States.

Plaintiff, upon information and belief, alleges that CITY accepts and maintains rules and policies concerning indemnification of those of their ministerial agents for law enforcement who are defendants herein. Additionally, upon information and belief, CITY funded and continues to fund the education and training of these law enforcement defendants in, among other things, the law of constitutional criminal procedure. CITY acts and acted, at all relevant times, when and as did its employee co-defendants herein.

5. Where pertinent to this Complaint, defendant ROCHFORD was Superintendent of the Chicago Police Department. As principal officer of that department and agent for law enforcement for CITY, he had among his duties, authorizing, directing, ratifying and implementing procedures: (a) for the execution in a lawful manner of arrests and arrest warrants; (b) making readily accessible to arresting police officers accurate data concerning warrants judicially quashed and recalled; (c) to uphold state and federal constitutional law prohibiting judicially vacated and void arrest warrants from being negligently, willfully and wantonly executed against blameless individuals such as plaintiff so as to deprive said citizens of liberty and property; (d) for the proper implementation of these aforementioned lawful arrests by his fellow servant officers, as well as; (e) for learning of and correcting patterns and customs, such as complained of by plaintiff, of state and federal constitutional criminal procedure deprivations within Chicago.

6. Defendant O'GRADY is the present Chicago Superintendent of Police. He presently holds the same responsibilities and performs the same ministerial duties alleged above as to defendant ROCHFORD.

7. Defendants ZIEMKE, PAPPAS and MEYERS, at all times pertinent to this complaint, were acting under the authority and within the scope of their employment as law enforcement agents of defendant CITY; upon information and belief, they were at relevant times and continue to be trained by CITY in the law and implementation of constitutional criminal procedures. Further, they were and are under a duty to report to defendants ROCHFORD and O'GRADY patterns or customs of deprivation of constitutional rights within Chicago such as those alleged here as to plaintiff.

8. Where pertinent to this complaint, Defendant FINLEY was and is Clerk of the Circuit Court of Cook County. In that capacity, he had and has among his duties, authorizing, directing, approving, and implementing practices and procedures for: (a) receiving and recording the decisions and orders in criminal prosecutions in the Circuit Court of Cook County; (b) alone and in concert with CITY, through expeditious and reliable procedures, communicating to relevant law enforcement personnel, judgments and mandates of the judiciary of Cook County, Illinois in criminal matters such as the orders and mandates plaintiff alleges were here ignored; (c) defining and instituting effective practices and procedures to insure that the recall of an arrest warrant is communicated to law enforcement agencies in Cook County in a sufficiently timely manner so that innocent persons such as plaintiff are not unlawfully detained and unlawfully made to defend anew criminal charges which have previously been disposed of by judicial action; (d) monitoring and insuring that such practices and procedures were properly implemented by his agents and employees; and, (e) remedying failures of implementation of such procedures.

CLAIM

9. Approximately 6-12 months after plaintiff's purse and checkbook were stolen (which theft was duly reported to the police), some of these checks appeared and were unlawfully cashed at various retail stores. This resulted, naturally, in plaintiff's arrest pursuant, among others, to Complaint No. 74 M1-G453066, the charge material to and resulting in the wrongs herein alleged.

10. Plaintiff posted bond and a hearing was set for 4 November 1974, in the Circuit Court of Cook County, Criminal Division, Branch 68. At that date and place, plaintiff filed her appearance and all similar and related complaints were dismissed except Complaint No. 74 M1-G453066, which case was continued to 9 December 1974. Plaintiff, however, left Court on 4 November 1974, under the reasonable impression that all charges were dismissed; she therefore failed to appear in Branch 68 on 9 December 1974, leading to an order of Court forfeiting bond and issuing an arrest warrant. It is this arrest warrant of 9 December 1974 (D7641252), which is in issue. (See Exhibit "B".)

11. After notification of the issuance of the arrest warrant of 9 December 1974, plaintiff appeared before the aforementioned Branch 68 and, on 13 January 1975, the arrest warrant issued 9 December 1974, was quashed and recalled by court order (recall #I242516). Thereafter, on 10 February 1975, in this same Branch 68, there being no proof of deceptive practices against plaintiff, Judge Zlatnik discharged plaintiff and dismissed case No. 74 M1-G453066, said discharge and dismissal constituting the final adjudication in said matter. (See Exhibit "B".)

12. Nevertheless, fully two and one-half months after a judicial Order of Recall (on 25 March 1975), defendants ZIEMKE and PAPPAS, having no probable cause to believe plaintiff committed or was committing a crime, but acting purportedly under the "authority" of a warrant they knew or with reasonable effort should have known was void, unlawfully entered plaintiff MURRAY's then residence, unlawfully detained her and took her into custody against her will. ZIEMKE and PAPPAS then took plaintiff to the 18th District Chicago police station and then to the Central Police Headquarters at 1121 S. State Street, Chicago, where, against her will, she was forced to strip naked and submit to searches conducted and observed by Defendant MEYERS and others, all of whom intentionally and without legal cause conducted and observed the strip and search. Plaintiff was then imprisoned by these defendants for approximately six or seven hours. Finally, she was released and thereby compelled to appear, again, in Branch 68 on 10 April 1975 (at which time plaintiff was, of course, "discharged" again, there being "no warrants outstanding").

13. Prior to and simultaneous with the arrest, charging, search, and imprisonment of 25 March 1975, defendants ZIEMKE, PAPPAS, MEYERS and other Chicago police officers obtained and were given information by MURRAY concerning this warrant and its recall; as a result, they knew or should have known that said warrant was void and that they were therefore acting illegally, their lawful authority as to MURRAY having long since been withdrawn by judicial order.

14. In fact, ZIEMKE, PAPPAS and MEYERS, acting pursuant to rules, regulations and laws of CITY and of Illinois and the United States had a constitutional duty

to determine the illegality of their ongoing conduct, as alleged by plaintiff, expeditiously and reasonably so as to spare plaintiff and those others in her situation, from the wrongs alleged within and material to this Complaint.

Further, and alternatively, if there existed no reasonably rapid and effective procedure available to these arresting officers to make the above determinations of illegality, then they had and continue to have a legal duty to make known to their superiors, including defendants ROCHFORD and O'GRADY acting for CITY, the fact of the unavailability of such adequate procedures; these officers knew or had reason to know (a) that warrants executed by them (such as upon plaintiff) had, on many occasions, been warrants previously recalled, and (b) that such warrants were therefore void.

15. The Other Presently Unknown defendants are those who, on or about 25 March 1975, and thereafter, were agents of CITY responsible within the scope of their employment, for planning, administering and directing the collection and dissemination of accurate data on the current validity or illegality of arrest warrants, such as the warrant herein issued and executed upon plaintiff in violation of her constitutional rights.

16. Defendant FINLEY, and those other of his fellow servants and employees also responsible on 13 January 1975 and on 25 March 1975, for authorizing, approving and implementing their duty to expeditiously communicate judicial orders concerning arrest warrants, did not, prior to 25 March 1975, fulfill their constitutional duty to communicate in a reasonable manner to these law enforcement defendants the fact that a judicial order of two and one-half months earlier had made illegal and unconstitutional the conduct then occurring upon and toward plaintiff on or about 25 March 1975.

17. As a direct and proximate result of the aforementioned acts, omissions, conduct and customs of the defendants, immediately after release from the unlawful custody alleged here, plaintiff was admitted to St. Joseph's Hospital, Chicago, Illinois, for five days, forced to seek emergency and continuing medical treatment, to incur much physical and mental injury and substantial expense and other losses; additionally, she was compelled to attend court on 10 April 1975, without reason, to defend nonexistent charges, to incur unwarranted costs and fees, and to suffer great fear, humiliation and degradation.

The conduct, procedures, and customs herein alleged occurred and continue to occur during the course of and as a result of defendants' knowing unconstitutional adoption, promulgation, ratification and implementation of policy statements, regulations and known custom. These acts and omissions occurred under color of state law; defendants knowing of the illegality of these policies, regulations and customs, negligently, willfully and wantonly caused them to occur and to continue, and took and continue to take no measures to prevent them. Thus, defendants negligently and intentionally deprived plaintiff of:

(a) her right to be free from State deprivation of liberty without due process and equal protection of the law, as guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments, and by Title 42 U.S.C. §§1983, 1985, 1986 and 1988;

(b) her right to be free from arbitrary and unreasonable exercises of State police power, as guaranteed by the Ninth, Tenth and Fourteenth Amendments, and by Title 42 U.S.C. §§1983, 1985, 1986, and 1988; as well as

(c) her rights to be free from the physical and mental injuries alleged herein occurring from constitutional torts of these defendants.

WHEREFORE, plaintiff TONI MURRAY, prays for:

A. Judgment against defendants, each of them, jointly and severally, in the amount of ONE HUNDRED THOUSAND DOLLARS as and for compensatory and punitive damages;

B. a permanent injunction against further implementation of defendants' present policies and customs which permit unlawful arrests, charging, searches and imprisonment as a result of invalid and void warrants;

C. a permanent injunction that all defendants, collectively and cooperatively, develop and implement, within a reasonable time, a system within Chicago for the maintenance of readily available data from which the current legality of arrest warrants, contested and challenged by arrestees as being void and unlawful, can be determined in a constitutionally reasonable time by arresting police officers;

D. the costs and expenses of this litigation;

E. attorneys' fees (or alternatively, leave for plaintiff's counsel to file for same pursuant to federal statute or common law); and

F. such other and further relief as this Honorable Court shall deem meet, just and equitable.

TONI MURRAY, Plaintiff

by: _____
LAWRENCE SCHLAM (#2444)
Attorney for Plaintiff

Lewis University College of Law
Glen Ellyn, Illinois 60137
858-2349

Of Counsel:

HARVEY L. WALNER & ASSOCS., LTD.
230 W. Monroe Street
Suite 2000
Chicago, Illinois 60606

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

The undersigned plaintiff MURRAY affirms that she has read and understood the above Complaint and that it is true in substance and in fact to the best of her knowledge.

/s/ TONI MURRAY, Plaintiff

SUBSCRIBED and SWORN to
before me this 9th day
of February, 1979.

/s/ LAWRENCE SCHLAM

EXHIBIT A To Plaintiff's Complaint:

NOTICE OF CLAIM FOR PERSONAL INJURIES

John C. Marcin
City Clerk
City of Chicago
City Hall
Chicago, Illinois 60602

Stanley T. Kusper
County Clerk
County of Cook
113 N. Clark Street
Chicago, Illinois 60602

William R. Quinlan
Corporation Counsel
City of Chicago
122 North LaSalle
Chicago, Illinois 60602

Morgan M. Finley
Clerk of the Circuit
Court of Cook County
118 N. Clark Street
Chicago, Illinois 60602

You are hereby notified that TONI MURRAY will bring a civil action against the City of Chicago, the Chicago Police Department, the Clerk of the Circuit Court of Cook County, and one or more of their agents, officers, and employees, for damages on account of injuries suffered as noted below. This notice is given pursuant to *Ill. Rev. Stat.*, Ch. 85, §8-102:

1. Name of person to whom this cause of action accrued: TONI MURRARY
2. Name of injured person: TONI MURRAY
3. Address of injured person: 2123 N. Racine, Chicago, Illinois
4. Incident occurred on the 25th day of March, 1975, in the late morning and early afternoon hours, and continued for a period of time thereafter.
5. Locations of incident: 2123 N. Racine, 113 W. Chicago Ave., 1121 S. State St., and subsequently, in various courts and a hospital.
6. General nature of incident: False arrest at 2123 N. Racine by Chicago police officers, J. Ziemke, Star #2303, and T. Pappas, Star

#3456, on a void and invalid arrest warrant, consequent false imprisonment and unreasonable search by Chicago police officer Sgt. MEYERS, Star #967 and other officers presently unknown.

7. Attending physician: ZAGORKA BRESICH M.D.
8. Attending hospital: St. Joseph's Hospital, 2900 N. Lake Shore Drive, Chcago, Illinois.

By: /s/ LAWRENCE SCHLAM
Attorney for Claimant
110 S. Dearborn St., Room 1620
Chicago, Illinois 60603
263-1830

Of Counsel: *Illegible*

[Exhibit B To Plaintiff's Complaint Is Reproduced Herein At Page 31.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Received April 26, 1979)

TONI MURRAY,

Plaintiff,

v.

CITY OF CHICAGO, etc., et al.,

Defendants.

No. 79 C 1176

MOTION TO DISMISS OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Now comes defendant MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, by his attorney, BERNARD CAREY, State's Attorney of Cook County, and moves that this Court dismiss the complaint for failure to state a cause of action, or in the alternative enter a summary judgment in favor of defendant Finley. In support of this motion the defendant states:

A. Motion to Dismiss

1. No facts are alleged to show that defendant Finley was personally involved in any deprivation suffered by the plaintiff. As *respondeat superior* is not an applicable doctrine in either Section 1983 or Section 1331 actions, and personal involvement is the touchstone of liability in

such actions, the complaint fails to state a claim against defendant Finley upon which relief can be based.

2. It is nowhere alleged that defendant Finley acted deliberately to deprive the plaintiff of her civil rights. As an allegation of mere negligence does not state a claim under Sections 1983 and 1331, the complaint fails to state a claim against defendant Finley.

3. Insofar as the plaintiff seeks damages against defendant Finley, the plaintiff nowhere alleges that defendant Finley acted in bad faith or with intent to harm the plaintiff. Accordingly, defendant Finley is immune from an award of damages in this action.

4. Insofar as the plaintiff seeks that this Court enjoin the Office of the Clerk to institute certain new procedures, doctrines of comity and federalism preclude the Court from entering such relief.

B. Motion for Summary Judgment

1. The attached documents and affidavits establish:

a. That the Office of the Clerk has detailed procedures for effectively handling warrant recall orders.

b. That it appears that these procedures were fully followed in the case of the January 13, 1975 recall of the outstanding warrant in the case of *People v. Toni Murray*, 71 M1-G453066.

2. If there was any breakdown in the system in this case, it was the result of mere negligence or inadvertence, which does not arise to a constitutional deprivation as a matter of law.

WHEREFORE, defendant Finley prays that the Court will grant the relief he seeks.

BERNARD CAREY
State's Attorney of Cook County

By: ELLEN G. ROBINSON
Assistant State's Attorney
500 Richard J. Daley Center
Chicago, Illinois 60602
443-5444

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

Now comes ROBERT GROSSMAN, first having been duly sworn on oath and states:

1. In my official capacity I am the Chief Deputy Clerk of the First Municipal District, Criminal Department, of the Circuit Court of Cook County.

2. In this capacity I am charged with supervising the activities of all the clerks of the courts of the First Municipal District, Criminal Department. In addition, I supervise the keeping of the records of these courts.

3. I have examined the contents of the court file for the case of *People v. Toni Murray*, 74 MI G453066. This file consists of various documents including a "half-sheet," and a warrant recall order. These documents constitute records made in the course of regularly conducted courtroom activity by clerks who were present at the time the activity occurred and who were charged with the duty to make these records as part of their regular duties. (See exhibits 1 and 2)

4. When an outstanding warrant is ordered recalled by a judge, it is the duty of the clerk to follow this procedure:

a. The clerk notes the recall order on the "half-sheet."

b. The clerk fills out a warrant recall order and obtains the judge's signature.

c. The clerk sends the original of this order to the Chicago Police Department and sends copies of the order to the Office of the Clerk by placing all copies with outbound mail.

d. The clerk places a copy of the order in the court file.

5. This procedure for handling warrant recalls was devised by a committee consisting of the Executive Director of the Chicago Crime Commission, the Presiding Judge of the First Municipal District, Criminal Division, representatives from the State's Attorney's Office, the Chicago Police Department, and the Office of the Clerk of the Circuit Court of Cook County. (See attached Memorandum to Clerk, August 13, 1974. Exhibit 3.)

6. This procedure is described fully on pages 27, 28 of the operating manual distributed to all deputy clerks of the Circuit Courts of Cook County. (See exhibit 4)

7. Based upon my personal investigation of the matter alleged in this complaint, it is my opinion that the above-described procedures were followed by all persons under my supervision responsible for recalling the outstanding warrant for Ms. Toni Murray on January 13, 1975.

/s/ ROBERT GROSSMAN

Subscribed and Sworn to
before me this 19 day of
April, 1979.

/s/ PETER J. JUSTES
Notary Public

EXHIBIT 2

STATE OF ILLINOIS)
) ss.
CITY OF CHICAGO)

January 13, 1975

In The Circuit Court of Cook County, Illinois
MUNICIPAL DEPARTMENT, FIRST DISTRICT
No. 131593

ORDER

MATTHEW J. DANAHER
CLERK OF COURT

IT IS ORDERED that the capias, warrant or attachment in Case No. G453066 entitled THE PEOPLE OF THE STATE OF ILLINOIS — CITY OF CHICAGO — PARK DISTRICT v. TONI MURRAY be recalled and returned to above mentioned file and upon return thereto, said file(s) shall be delivered to Branch No. 68 located at _____.
Nature of motion warrant recall.
SET DATE January 27, 1975 CASH BOND AMOUNT ____
BONDSMAN _____

_____
Signature of Defendant or his Attorney

PRESENTED BY:

/s/ MAURICE MCNICHOLAS
Deputy Clerk

Enter: /s/ M. GOLDSTEIN
JUDGE

Date issued to Police January 13, 1975
Date returned _____ 19____

EXHIBIT 3

COUNTY OF COOK
OFFICE OF CLERK OF THE CIRCUIT COURT

TO: Clerks - Criminal Department DATE 8/13/74

FROM: R. Grossman -

SUBJECT: NEW PROCEDURE ON BRING-BACK OF B/F Files Effective August 15, 1974.

The following program has been developed by a group composed of representatives of the Clerk's Office, Presiding Judge, and Police Department, as well as the State's Attorneys Office. This group was appointed by the Mayor's Committee on Criminal Justice of Cook County Ad Hoc Committee.

The purpose of this program is to insure notification of arresting officers and complainants in all cases where there has been a Bond Forfeiture and Warrant when that case is reinstated, either by a voluntary appearance or after arrest on warrant by the defendant.

Commencing August 15, 1974, the following procedure will be used in all cases where a bring-back or inter-office memo is used to order a file from the Civic Center:

1. The Court Clerks shall prepare the bring-back or inter-office memo, and on cases brought back prior to judgment shall assign the judgment date as the next court date (court citing date card attached). Where judgment has already been entered - a date at least two weeks later shall be given.

All bring-back forms must be signed by the Judge. The most important point is *no* files will be returned to court without the signature of the Court Sergeant on the bring-back or inter-office memo.

2. The second copy of the prepared form shall be given to the Court Sergeant who will then sign the third copy; three copies of the bring-back or inter-office memo will be sent to Room #1006, Civic Center, for transmittal of the file, and for recall of the warrant. There will be no necessity for the court clerk to keep a copy for his records since a copy is available in the court (Court Sergeant's copy). Under no circumstances will a file be sent back without a bring-back - via phone call the same day - or after being set for a short date.

EXHIBIT 4

required to attach a supplemental half-sheet to the file so that the day's order may be properly recorded and so that he has a copy of the order which must be transferred to the original half-sheet when the original court file is obtained. The inter-office memos, after their completions, are also retained in a convenient place until the work is broken down at the end of court.

C. RECALLS AND INTER-OFFICE MEMOS:

Another consideration concerns the recalling and proper quashing of warrants. From time to time the clerk will be required to process motions to recall warrant and motions to vacate bond forfeitures. This is a particularly crucial area for the clerks, as a failure to follow the correct procedure may expose both the individual clerk and the clerk's office to liability under the Civil Rights Act Title 42 USC §1983 as an infringement of a defendant's civil rights. Indeed this is a very serious area that may cause the defendant to be subsequently and wrongfully rearrested on a warrant that should not be properly still outstanding. Whenever the judge sus-

tains a motion to recall a warrant or a motion to vacate a bond forfeiture or simply orders a warrant recalled or quashed, it is the clerk's duty to immediately complete and issue a warrant recall. The warrant recall form itself is self-explanatory, and a copy of the form is appended. The primary difference between a warrant recall and an inter-office memo, is that a warrant recall requires the judge's signature; this is an absolute must. Other than the requirements of the judge's signature requirement, the information required on the warrant recall form is identical to that of the inter-office memo with the same requirement of the Court Sergeant's signature. Both forms are four-part form sets where the blue copy is given to the Court Sergeant and the yellow copy is to be retained in the form book, with the other two copies being sent into the office immediately when the work is broken down at the end of the day. On the appropriate set date the returned warrant and file must be attached along with any written motions before the case is entered upon that day's court call. If, however, the case has been disposed of with a final order before the warrant has been returned to court after being recalled, the clerk will send the warrant and recall copy to the vault to be made part of the file. Again - it is absolutely vital that when the judge orders a recall or that the warrant be quashed, a written warrant recall must be completed and issued immediately. The recall number should be noted on the half-sheet or on the motion that has been filed, as well as the recall copy in the recall book, both for ready reference and protection of the Court.

EXHIBIT 5

AFFIDAVIT:

Now comes Maurice McNicholas, Deputy Clerk, and on oath deposes the following:

As best as I can recollect, on January 13, 1975, I was the Deputy Court Clerk assigned to Branch 68, Room 1104, Daley Center in what was then called the Civic Center.

I was responsible for calling the cases that day. The case of People of the State of Illinois vs. Toni Murray, docket No. G453066 was listed on the judgment sheet for that day. The presiding Judge in Branch 68, that day, was the Honorable Meyer Goldstein.

When the above mentioned case was called, Judge Goldstein entered an order recalling the warrant granting an I bond to Toni Murray in the amount of $500.00, and the case was continued by motion of the State to January 27, 1975.

I filled out a warrant recall form No. 131593, and had Judge Goldstein sign it, and then I signed it. I was unable to get Miss Murray's signature. A different Deputy Clerk made out her I bond.

I kept one copy of the warrant recall form for the file. The rest of the copies were placed in the bundle of out work for that day from Branch 68. Said bundle was then deposited by me at a receiving location for disposal and sorting of forms and files. This sorting work is done by other Deputy Court Clerks, and I have no further knowledge of what occurred on that day to the recall forms.

/s/ MAURICE MCNICHOLAS
Deputy Clerk
First Municipal District
Clerk of Circuit Court

April 10, 1979

Subscribed and sworn to before me
this 10th day of April 1979.

NOTARY PUBLIC /s/ HELEN THERESE MURRAY
My commission expires September, 1981.

PROCEDURE RE: MOTION TO VACATE BOND FORFEITURE AND RECALL OF WARRANTS IN ALL COURTS (EXCEPT TRAFFIC)

General Order No. 74-8(M)

All motions to vacate bond forfeiture and warrants orders, made prior to the judgment date (which is the next scheduled police citing date, at least 30 days after the forfeiture order), shall be processed as follows:

a. Upon filing, provided at least two weeks remains prior to judgment date, the motion shall be entered and continued to the judgment date.

b. The warrant may be recalled, provided defendant is in court. The clerk shall deliver the warrant recall to the Central Warrant Unit. The court sergeant shall notify the witnesses of the trial date which shall be the judgment date.

c. In the event less than two weeks remain, prior to judgment date, the motion shall be continued to judgment date, and on judgment date said matter shall be continued to a trial date, at least, two weeks later.

d. The warrant may be recalled, provided defendant is in court. The clerk shall deliver the warrant recall order to the Central Warrant Unit. The court sergeant shall notify the witnesses of the trial date.

e. In the event defendant fails to appear, the judgment of forfeiture shall be ordered and the warrant reissued.

All motions to vacate bond forfeiture and/or judgment of forfeitures made after the judgment date shall be processed as follows:

a. Upon filing, the motion shall be entered and continued to a trial date of not less than two weeks. Court files shall be ordered for the trial date.

b. The warrant may be recalled, provided defendant is in court. The clerk shall deliver the warrant recall order to the Central Warrant Unit. The court sergeant shall notify the witnesses of the trial date.

c. At the trial date all pertinent files must be available and all orders properly entered thereon. This includes vacatures of any forfeiture or forfeiture judgment and the recall of warrant. All documents must be attached to the Master Court File.

d. In the event defendant fails to appear, the judgment of forfeiture shall be ordered and the warrant reissued.

e. Draft Order (form attached) must accompany vacatures if bond is to be refunded. (If refund is to be made to defendant's attorney it shall so specify on this draft order, and must be accompanied, by order for refund to attorney, duly executed by the defendant and the court.) No draft order will be processed for refund until final disposition of all matters covered by the bond.

The order, dated at Chicago, August 13, 1974, is signed by Eugene L. Wachowski, presiding judge.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TONI MURRAY,

Plaintiff,

vs.

CITY OF CHICAGO, et al.,

Defendants.

No. 79 C 1176
Judge Hoffman

AFFIDAVIT

I, JOHN ZIEMKE, being first duly sworn, state and depose as follows:

That, I am a Chicago Police Officer employed as a Warrant Officer in the 18th Police District Warrant Unit and was so employed on March 25, 1975.

That, my duties include attempting to serve warrants and determining whether such warrants are still current.

That, my partner Theodore Pappas and I received a warrant issued against plaintiff in this cause and served such on March 25, 1975.

That, pursuant to said warrant we proceeded to 2123 North Racine Avenue and arrested plaintiff.

At the district station, Central Warrant Section was contacted wherein it was established that the warrant was still current.

That, at this time the Arrest Slip was prepared and plaintiff was transported to Central Detention Section at 1121 South State Street, Chicago, Illinois.

That, at no time did I know that the warrant in question had been recalled.

/s/ JOHN ZIEMKE

SUBSCRIBED and SWORN to
before me this 11th day
of April, 1979.

/s/ JENNIFER DUNCAN-BRICE
NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TONI MURRAY,

Plaintiff,

vs.

CITY OF CHICAGO, et al.,

Defendants.

No. 79 C 1176
Judge Hoffman

AFFIDAVIT

I, THEODORE PAPPAS, being first duly sworn, state and depose as follows:

That, I am a Chicago Police Officer employed as a Warrant Officer in the 18th Police District Warrant Unit and was so employed on March 25, 1975.

That, my duties include attempting to serve warrants and determining whether such warrants are still current.

That, my partner John Ziemke and I received a warrant issued against plaintiff in this cause and served such on March 25, 1975.

That, pursuant to said warrant we proceeded to 2123 North Racine Avenue and arrested plaintiff.

At the district station, Central Warrant Section was contacted wherein it was established that the warrant was still current.

That, at this time the Arrest Slip was prepared and plaintiff was transported to Central Detention Section at 1121 South State Street, Chicago, Illinois.

That, at no time did I know that the warrant in question had been recalled.

/s/ THEODORE PAPPAS

SUBSCRIBED and SWORN to
before me this 11th day
of April, 1979.

/s/ JENNIFER DUNCAN-BRICE
NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TONI MURRAY,

Plaintiff,

vs.

CITY OF CHICAGO, et al.,

Defendants.

No. 79 C 1176
Judge Hoffman

AFFIDAVIT

I, BERNARD KELLY, being first duly sworn on oath, depose and state as follows:

1. That I am an employee of the City of Chicago Police Department, presently holding the position of sergeant.

2. I am presently assigned to the Warrant Division at Police Headquarters at 1121 South State as Warrant Sergeant.

3. That at the time relevant herein, the warrant in question concerning the plaintiff herein should be referred to as Warrant Docket Number G 453066 and not D 7641252 as incorrectly referred to in the herein plaintiff's Complaint.

4. That I searched the Chicago Police Department's internal warrant recall book and found no listing of recall of said warrant.

5. That I searched the Court transmittal sheets for 13 January 1975 and 10 February 1975 and have not found a record of recall of said Warrant being issued.

6. Pursuant to my search of the record, the Chicago Police Department did not receive notice of Warrant Recall Court Docket Number G453066 concerning the plaintiff herein.

/s/ BERNARD KELLY

Subscribed and Sworn to
Before Me this 11 day
of April, A.D., 1979

/s/ ELMER L. FOX
NOTARY PUBLIC

JUN 22 1974

(Court Date)

CLERK OF THE CIRCUIT COURT OF COOK COUNTY

CMCI-225 (1973) 379

MISDEMEANOR

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

The People of the State of Illinois
Plaintiff

v.

COMPLAINT

No. G463066

Toni Murra

(Last)

Apropos, Inc. an Illinois Corporation complainant, now appears before
(Complainant's Name Printed or Typed)

The Circuit Ca of Cook County and states that

Toni Murra
(Defendant)

has, on or about

April 6, 1974 at 3315 N Broadway Chicago, Cook County,
(Date) (Place of offense)

committed the offense of Deceptive Practice in the

obtained control over the property of Apropos, Inc.

, an Illinois Corporation; to wit, ladie's

clothes

, the value of $47.25 U.S. Currency, with the intent to defraud said

complainant, and did issue and deliver a certain bank check drawn upon the

Michigan Avenue National Bank of Chicago , Illinois

in the amount of $47.25 U.S. Currency, knowing that said check would not

be paid by the Michigan Avenue National Bank

in violation of Chapter 38 Section 17-1 (d)

ILLINOIS REVISED STATUTES

FILED
MUNICIPAL COURT OF CHICAGO
FIRST MUNICIPAL DISTRICT
OF CIRCUIT COURT, COOK COUNTY

JUN 18 1974

HAROLD A. ROSENBERG
CLERK OF COURT

James J. Elkin
(Complainant's Signature)

3315 N Broadway Chicago, IL 528-2130
(Complainant's Address) (Telephone No.)

Apropos, Inc. an Illinois Corporation
(Complainant's Name Printed or Typed)

STATE OF ILLINOIS)
COUNTY OF COOK) ss.

being first duly sworn, on oath says that he has read the foregoing complaint by him subscribed and that the same is true.

James J. Elkin
(Complainant's Signature)

Subscribed and sworn to before me 6/18, 19 74

(Judge or Clerk)

I have examined the above complaint and the person presenting the same and have heard evidence thereon, and am satisfied that there is probable cause for filing same. Leave is given to file the said complaint.

Summons Issued. Judge

or

Warrant Issued. Bail set at

Judge

Defendant Finley's EXHIBIT 1
Plaintiff's EXHIBIT B to §1983 Complaint

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
Tom Finley

Section 38-17-10

NO. 6453066 BR68

DATE	PAPERS FILED AND WRITS ISSUED
JUN 1 8 1974	Information Filed
JUL 1 3 1974	SUM ELD RET NOT FOUND
	Warrant Issued
JULY 2 8 1974	Warrant Returned Executed and Filed
DEC 9 1974	BF Warrant Issued
APR 3 1975	Warrant Returned Executed and Filed 0764 1252

DATE	JUDGE	ORDERS ENTERED
JUL 2 2 1974	MICHAEL E. ZLATNIK	Leave to to file Complaint. Bail $ Court takes jurisdiction of defendant in court on complaint filed.
	MICHAEL E. ZLATNIK	Warrant of Bail $500 MS 12-9-74
DEC 9 1974	MICHAEL E. ZLATNIK	BR68 Recognizance of defendant and surety forfeited Capias issued vs. defendant $1500
JAN 1 3 1975	Solbitz	MS 1-27-75 Bond $500 Warrant Recalled I 242 41
JAN 2 7 1975	MICHAEL F. ZLATNIK	MS 2-10-75 Defendant need not be in court at the date and time of hearing unless defendant is given notice to appear

DATE	JUDGE	ORDERS ENTERED
JAN 2 7 1975	MICHAEL F. ZLATNIK	
2-10-75	MICHAEL F. ZLATNIK	MD Case dismissed
APR 1 0 1975	MICHAEL F. ZLATNIK	MS Disch CBR No warrants outstanding

RECEIVED
OCT 1 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

NO. 80-2205

MORGAN M. FINLEY, CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

Petitioner,

vs.

TONI MURRAY,

Respondent.

REPLY TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioner premises his argument for certiorari on the mistaken assumption that all section 1983 suits against court clerks should be dismissed on the ground of absolute immunity regardless of the manner in which any particular clerk is shown at trial to have violated a citizen's constitutional rights. Should Respondent, however, prove in a trial of this cause that Petitioner wilfully or recklessly failed to carry out the court's ministerial order to recall her arrest warrant, any possible rationale for according absolute immunity would be far different from a case in which a court clerk's constitutional violation resulted from his negligent exercise of discretion. Indeed, immunity for a clerk who deliberately or recklessly fails to carry out a judicially ordered ministerial duty would be irreconcilable with any previously stated rationale for according quasi-judicial immunity. See McCray v. Maryland, 456 F.2d 1, 4 (4th Cir. 1972). In its present pre-trial posture this case is thus an inappropriate vehicle for deciding the appropriate level of immunity for court clerks since the pleadings would allow Respondent to prove at trial conduct by Petitioner that would make the grant of immunity wholly unwarranted.

Supreme Court review of this case is unwarranted not only because of its premature posture, but also because the submitted issue of whether state court

clerks are entitled to absolute immunity has been for all practical purposes settled by this Court's recent decisions elaborating the standards for granting such immunity in section 1983 cases. The division among the circuit and district courts on this issue arises from cases decided before this Court clarified the standards for granting immunity in Butz v. Economu, 438 U.S. 478 (1978), Owen v. City of Independence, 445 U.S. 622 (1980), and Dennis v. Sparks, 101 S.Ct. 183 (1981). These cases mandate consideration of two criteria for granting absolute immunity: first, whether the immunity was well established at common law in 1871 when section 1983 was enacted, and second, whether the rationale for the immunity is compatible with the purposes of section 1983. Neither criterion is met with regard to court clerks who violate citizens' constitutional rights.

First, the pre-1871 case law is unanimous in recognizing court clerks' liability in damages for injuries resulting from the misfeasance of their ministerial duties. See e.g. State v. Merritt, 65 N.C. 558 (1871); Clark v. Wilcox, 31 Tex. 322 (1868); Lick v. Madden, 36 Cal. 208 (1868); Pass v. Dibrell, 16 Tenn. (8 Yer.) 470 (1835); See generally, 11 C.J. Clerks of Courts §86 ("Where a clerk of court fails or refuses to perform, or is negligent in the performance of, a duty imposed on him by law... and, if his act was the direct and proximate cause of the resultant injury, without contributory negligence on the part of the party complaining, the clerk is liable in damages therefor both personally and on his official bond." Id. at 892) (footnotes omitted).

Furthermore, immunizing court clerks from damages would be incompatible with the express motivation of Congress in enacting Section 1 of the Civil Rights Act of 1871. As this Court recognized in Mitchum v. Foster, 407 U.S. 225, 240 (1972), one of the major purposes of the Act's proponents was to provide a federal remedy for the violations of freedmen's and their sympathizers' constitutional rights by state court officials. See also statements of Sen. Osborn, Cong. Globe, 42d Cong. 1st Sess., 653 (1871); Rep. Platt, Id. App. at 186; Rep. Rainey, Id. at 394. It is thus not possible

in this case "to infer from legislative silence a congressional intention to abrogate immunities that were both 'well established at common law' and compatible with the purposes of the Civil Rights Act." Gomez v. Toledo, 446 U.S. 635, 639 (1980), quoting Owen v. City of Independence, 445 U.S. 622, 638 (1980).

Absolute immunity for court clerks also can not be justified under either of the two policy reasons this Court has heretofore stated as necessary grounds for according such immunity. First, the policy of promoting officials' fearless and principled exercise of discretion in the discharge of their duties, see Pierson v. Ray, 386 U.S. 547, 554 (1967), and Ferri v. Ackerman, 444 U.S. 193, 203-04 (1981), obviously does not apply to the non-discretionary discharge of ministerial duties. Indeed, as Judge Swygert pointed out in his concurring opinion in this case, Petition at 6a-7a, the better rule recognizes no immunity of any kind for court clerks who violate citizens' constitutional rights through misfeasance of their ministerial duties.

The lack of an absolute immunity defense for court clerks' misfeasance of ministerial duties is further emphasized by this Court's insistence in Dennis v. Sparks, 101 S.Ct. 183 (1981), Stump v. Sparkman, 435 U.S. 349 (1978) and Gravel v. United States, 408 U.S. 606 (1972), that the function actually performed by officials, and not their status or position in government, determines their entitlement to absolute immunity. The court clerk's activity in question in this case, that of assuring the transmittal to the police of the court's arrest warrant recall order, can in no sense be deemed the performance of a judicial act.

Second, the justification for absolute immunity from damages depends upon the existence of alternative safeguards that are adequate to protect plaintiff's constitutional rights. Butz v. Economu, 438 U.S. 478, 512 (1978). Since the failures of court clerks to carry out their ministerial duties do not normally occur as part of adversarial proceedings that are subject to review by impartial higher authorities, the harm from such misfeasance is invariably inflicted without any chance for remediation outside of an action for damages. In this case Respondent has only damages as a remedy for her arrest, imprisonment and strip search, all of which resulted from Petitioner's unconstitutional failure to transmit the order recalling

her arrest warrant. Acceptance by this Court of Petitioner's claim of blanket immunity for state court clerks would thus make such officials wholly unaccountable for their violations of federally protected rights through misfeasance of their ministerial duties. This result would not be compatible with this Court's often expressed understanding of the relationship between the purposes of the section 1983 damage remedy and the doctrine of absolute immunity.

WHEREFORE, for the foregoing reasons, Respondent respectfully requests that the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

John Elson
Attorney for Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-2205

MORGAN M. FINLEY, CLERK OF THE
CIRCUIT COURT OF COOK COUNTY,
ILLINOIS,

Petitioner,

vs.

TONI MURRAY,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Toni Murray, by her counsel, John Elson, Northwestern University Legal Clinic, asks leave to file the attached Response to Petition For A Writ of Certiorari in accordance with the provisions of Supreme Court Rule 46 for the filing of papers by persons proceeding in forma pauperis.

This Court directed Respondent to file a Response to the Petition by October 2, 1981. The undersigned counsel was appointed to represent Respondent in this cause by the United States Court of Appeals for the Seventh Circuit. The Court of Appeals also granted Respondent's Petition For Leave To File and To Proceed In Forma Pauperis. Said Order of the Court of Appeals is attached hereto as Exhibit A.

WHEREFORE, Respondent respectfully requests leave to continue proceeding in this cause in forma pauperis.

Respectfully submitted,

John Elson
Counsel for Respondent

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Tel: (312) 649-8576

EXHIBIT A

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

January 30, 19 80

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. _____

Hon. _____

TONI MURRAY, Plaintiff-Appellant,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80-1035 vs.	
CITY OF CHICAGO, et al., Defendants-Appellees.	No. 79-C-1176 Julius J. Hoffman, Judge

On consideration of the "PETITION FOR LEAVE TO FILE AND TO PROCEED IN FORMA PAUPERIS" and affidavit in support thereof filed herein on January 22, 1980 by the pro se plaintiff-appellant,

IT IS ORDERED that said motion be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that Mr. John S. Elson, Northwestern University Legal Clinic, 360 E. Superior, Chicago, Illinois, 60611 be, and the same is hereby APPOINTED to represent the plaintiff-appellant herein.

IT IS ALSO FURTHER ORDERED that the following briefing schedule is hereby adopted:

1) The plaintiff-appellant's brief and appendix shall be due herein by March 11, 1980.

2) The defendants-appellees' brief shall be due herein by April 10, 1980.

3) The plaintiff-appellant's reply brief, if any, shall be due herein by April 24, 1980.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

NO. 80-2205

MORGAN M. FINLEY, CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

Petitioner,

vs.

TONI MURRAY,

Respondent.

PROOF OF SERVICE

John Elson, attorney for Respondent, certifies that he served the attached Motion For Leave To Proceed In Forma Pauperis and Response To Petition For Certiorari on counsel for Petitioner by placing the same in a postage prepaid envelope addressed to Joan Cherry, Assistant State's Attorney, 500 Richard J. Daley Center, Chicago, Illinois and placing said envelope in the United States mailbox at 339 East Chicago Avenue, Chicago, Illinois, before 5:00 p.m. on September 30, 1981.

John Elson

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FILED
JAN 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 80-2205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois,

Petitioner,

vs.

TONI MURRAY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

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PETITION FOR CERTIORARI FILED JUNE 29, 1981
CERTIORARI GRANTED NOVEMBER 2, 1981

QUESTION PRESENTED

Whether absolute judicial immunity shields the Clerk of the Circuit Court of Cook County from §1983 damages liability when performing judicial or quasi-judicial functions.

LIST OF PARTIES BELOW

The parties in the Court below not named in the caption in this brief are defendants City of Chicago, John Ziemke, Theodore Pappas, Sgt. Meyers, James Rochford, and James O'Grady.

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In The

Supreme Court of the United States

October Term, 1980

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois,

Petitioner,

vs.

TONI MURRAY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals is reported, *Murray v. City of Chicago*, 634 F.2d 365 (7th Cir. 1981). (Pet. Cert. App. A at 1a) The opinion of the District Court (Pet. Cert. App. B at 8a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 25, 1980. A timely petition for rehearing *en banc* was denied on March 31, 1981. (Pet. Cert. App. C at 24a) On March 11, 1981, the Seventh Circuit issued an amended opinion. The petition for a writ of *certiorari* was filed on June 29, 1981 and was granted on November 2, 1981. This Court's jurisdiction rests upon 28 U.S.C. §1254(1).

STATUTE INVOLVED

Title 42 U.S.C.

§1983. Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Background

On March 23, 1979, respondent Toni Murray filed this §1983 complaint against the petitioner, Morgan M. Finley, the Clerk of the Circuit Court of Cook County, the City of Chicago and five Chicago Police Officers, for alleged violations of constitutional rights when respondent was arrested on a recalled arrest warrant on March 25, 1975. The following facts led to respondent's arrest on the recalled warrant.

On June 18, 1974, respondent was charged in a misdemeanor complaint filed in the Circuit Court of Cook County with deceptive practices in violation of Ill. Rev. Stat. 1979, ch. 38, §17-1(d). (J.A. 31) A summons was issued for respondent to appear in court to answer the charge. (J.A. 31) On July 12, 1974, the summons was returned to the court because the respondent could not be found. (J.A. 31) On July 22, 1974 Judge Michael F. Zlatnik issued a warrant for respondent's arrest in the amount of $500.00. (J.A. 31) On October 8, 1974, the warrant was returned and filed with the court because respondent had been arrested on the warrant. (J.A. 31) This was the first arrest in respondent's criminal case. Respondent did not challenge this arrest in her §1983 complaint.

On November 4, 1974, respondent, free on bond, appeared in Judge Zlatnik's court where her deceptive practices charge was continued on the prosecutor's motion to December 9, 1974. (J.A. 31)

On December 9, 1974, respondent failed to appear in court. Judge Zlatnik issued the following order as reflected on the memorandum of orders: "Recognizance

of defendant and surety forfeited—warrant ordered vs. defendant $1500." (J.A. 31) Respondent did not challenge the issuance of this warrant in her §1983 complaint.

On January 13, 1975, before Judge Goldstein, sitting for Judge Zlatnik, respondent appeared in court to quash and vacate the warrant issued on December 9, 1974. The memorandum of orders reflects that Judge Goldstein released respondent on her own recognizance ("'I Bond' $500") and recalled the outstanding warrant for her arrest. (J.A. 31) The court granted the prosecutor's motion for a continuance until January 27, 1975. The deputy clerk, Maurice McNicholas, entered this order on the memorandum of orders. (J.A. 22)

Deputy Clerk McNicholas then filled out a warrant recall form, No. 131593. (J.A. 18, 22) The deputy clerk and Judge Goldstein signed respondent's warrant recall form. (J.A. 18, 22) Deputy Clerk McNicholas was unable to obtain respondent's signature. (J.A. 18, 22) The deputy clerk kept one copy of the warrant recall form for the court file, placed the rest of the copies in the bundle of "out work" for January 13, 1975, for his courtroom, and deposited the bundle at a receiving location for disposal and sorting of the forms and files by other deputy clerks. (J.A. 22)

On January 27, 1975, Judge Zlatnik granted the prosecutor's motion for a continuance to February 10, 1975. (J.A. 31) On February 10, 1975, Judge Zlatnik granted respondent's motion to dismiss the deceptive practices complaint against her.

On March 25, 1975, Chicago Police Officers John Ziemke and Theodore Pappas arrested respondent on the bond forfeiture arrest warrant issued December 9, 1974 and recalled on January 13, 1975. (J.A. 31) The

Chicago Police Officers' affidavits reflect that they did not know the warrant was recalled. (J.A. 25-30)

Respondent alleged in her §1983 complaint that she was transported from her home to the police station, strip-searched and incarcerated. (J.A. 7) After six or seven hours respondent was released from custody by posting bond. (J.A. 7) On April 10, 1975, respondent appeared in Judge Zlatnik's court where the prosecutor moved for respondent's discharge in the criminal case. (J.A. 31) The last entry on the memorandum of orders reflected "no warrants outstanding". (J.A. 31)

B. Warrant Recall Procedures

Illinois statutes governed the respondent's criminal proceedings. In Illinois, when a person like respondent is arrested and charged with an offense by the State's Attorney, a date is set for the defendant to appear in court. If the defendant is released on bond, pursuant to Ill. Rev. Stat. 1979, ch. 38, §110-10, and fails to appear in court, a condition of the bond, the State's Attorney then moves for a bond forfeiture and a warrant to issue. Ill. Rev. Stat. 1979, ch. 38, §§110-7(h), 110-10(a)(1) and 110-3. The court enters an order declaring the bail to be forfeited, and an order requiring notice of the order of forfeiture to be mailed to the defendant's last known address. The court then may issue an arrest warrant for the defendant's failure to appear. Ill. Rev. Stat. 1979, ch. 38, §§110-7(h) and 110-3. The court continues the case during which time the defendant can appear, surrender, move to quash and recall the warrant, and vacate the bond forfeiture order. Ill. Rev. Stat. 1979, ch. 38, §110-7(h). The clerk enters all orders on the reverse side of the misdemeanor complaint which contains the memorandum of orders. (J.A. 16, 31) In the instant case, these procedures were followed by the judge, prosecutor and the court clerk.

In effect at the time of respondent's arrest on the recalled warrant were General Order 74-8(M) and the petitioner's procedures designed to implement the General Order. On August 13, 1974, the Presiding Judge of the Municipal Department of the Circuit Court of Cook County, signed General Order No. 74-8(M) which created "Procedure Re: Motion to Vacate Bond Forfeiture and Recall of Warrants In all Courts (Except Traffic)." (J.A. 23) In pertinent part the General Order stated:

> All motions to vacate bond forfeiture and warrants orders made after the judgment date . . . shall be processed as follows:
>
> * * *
>
> b. The warrant may be recalled, provided defendant is in court. The clerk shall deliver the warrant recall to the Central Warrant Unit. The court sergeant shall notify the witnesses of the trial date which shall be the judgment date. (J.A. 23)

The court sergeant is a police officer assigned to a criminal courtroom. It is his function to notify crime victims and arresting officers of the new trial date since they could not have known that the defendant voluntarily appeared in court on a date other than the date set for trial.

In order to implement the General Order, Robert Grossman, the petitioner's Chief Deputy Clerk of the First Municipal District, Criminal Division, of the Circuit Court of Cook County, issued a memorandum to the deputy clerks in the Criminal Division notifying them of "New Procedure on Bring-Back B/F [bond forfeiture] files. Effective August 15, 1974." (J.A. 16, 19) The memorandum, issued the same day as the General Order, reflected that the new procedures were developed by representatives from the petitioner's office, the Pre-

siding Judge, the Chicago Police Department, and the Cook County State's Attorney's Office. (J.A. 17, 19)

The petitioner's procedures included the following steps to implement General Order 74-8(M):

> When an outstanding warrant is ordered recalled by a judge, it is the duty of the clerk to follow this procedure:
>
> a. The clerk notes the recall order on the "half sheet" [memorandum of orders].
> b. The clerk fills out a warrant recall order and obtains the judge's signature.
> c. The clerk sends the original of this order to the Chicago Police Department [Central Warrant Unit] and sends copies of the order to the office of the Clerk by placing all copies with outbound mail.
> d. The clerk places a copy of the order in the Court file. (J.A. 16-17)

In the instant case three of the four procedures were unquestionably followed. (J.A. 17) As for notification to the Police Department, either a deputy clerk mailed the warrant recall order to the police and it was lost in the mail or the recall order was inadvertently lost somewhere between the courtroom and petitioner's office.

C. Rulings Below

Respondent filed a §1983 complaint against the petitioner seeking damages resulting from her arrest on the recalled warrant, and from the harm that allegedly flowed from that arrest. (J.A. 2-11) After examining the petitioner's documents and affidavits in support of his motion to dismiss, or in the alternative, for summary judgment, the District Court concluded:

> [T]he procedures outlined previously were followed as to the plaintiff's arrest warrant. At best, it can only be said that if the Police Department did not receive notice of the recall, the subsequent arrest of the plaintiff was the result of inadvertence or accident. Such circumstances cannot give rise to an action under 42 U.S.C. Section 1983. *Little v. Walker*, 552 F.2d 193, Seventh Circuit, 1977; *Bonner v. Coughlin*, 545 F.2d 565, Seventh Circuit, 1976. (Pet. Cert. App. B at 19a)

The court granted petitioner's motion for summary judgment.

The Seventh Circuit reversed the judgment for all defendants below, remanded the case for trial, and held that "[s]omeone is surely at fault for failing to establish or execute appropriate procedures for preventing such serious malfunctionings in the administration of justice." *Murray v. City of Chicago, supra*, 634 F.2d at 366. In a footnote, the Seventh Circuit concluded:

> It is quite possible that the clerk of court, Finley, will also ultimately be dismissed if by amplified clarification of his procedures, he is able to establish that the methods used to convey recall orders to the police department are appropriate and adequate. *See Schnell v. City of Chicago*, 407 F.2d 1084, 1086 (7th Cir. 1968).
>
> Mere negligence of course, will not support a §1983 action against Finley. *See Bonner v. Coughlin*, 545 F.2d 565, 568 (7th Cir. 1976). Moreover, pending further clarification of the facts it would be premature to consider whether Finley is entitled to the defense of official immunity. *See Dieu v. Norton*, 411 F.2d 761, 763 (7th Cir. 1969). *Id.* at 367 n.4.

The petitioner appeals to this Court from the Seventh Circuit's holding which denied petitioner judicial immunity at the present stage of the pleadings.

SUMMARY OF ARGUMENT

The Clerk of the Circuit Court of Cook County contends that absolute judicial immunity shields court clerks from §1983 damages liability when the clerk performs judicial or quasi-judicial functions. The Seventh Circuit Court of Appeals denied the petitioner absolute immunity at the summary judgment stage of the pleadings. The Seventh Circuit's decision below was contrary to its prior holdings and to the well established majority rule today that court clerks are entitled to absolute immunity from §1983 damages liability. This Court's reversal of the Seventh Circuit's holding in this case would establish the court clerk's entitlement to absolute judicial immunity, the majority rule, as the law of the land.

The petitioner is an essential officer of the court who enables the court to properly perform its judicial duties. In Cook County, Illinois, the petitioner's deputy clerks are present every day to assist circuit court judges in the performance of their judicial duties in seven divisions and in six municipal districts throughout Cook County. In this case the petitioner's deputy clerks implemented the judge's order recalling respondent's warrant pursuant to court ordered procedures formulated by a joint committee of representatives from the Chicago Crime Commissions, the judiciary, the Chicago Police Department, the Cook County State's Attorney's Office, and petitioner's office. The deputy clerk assigned to the judge who issued respondent's warrant recall order followed every procedure required of him to note the recall order on the memorandum of orders, to fill out a warrant recall order, to obtain the judge's

signature, and to place a copy of the recall order in the court file. (J.A. 16-24) The letter notifying the Chicago Police Department of the fully executed warrant recall order was not received by the police department. At common law, and in other similar §1983 decisions, judicial immunity shielded court clerks who performed related judicial or quasi-judicial functions as though the court had performed the act.

Historical and public policy considerations are the foundation for petitioner's absolute immunity from §1983 damages liability. *Imbler v. Pachtman*, 424 U.S. 409, 421, 424 (1976). At common law, prior to the passage of the Civil Rights Act of 1871, court clerks were immune from liability when performing acts ordered by the court. A presumption existed that matters which the clerk was required to submit to the judge for approval were performed under the direction and with the approval of the judge. A court ordered act performed by the clerk was a judicial or quasi-judicial act cloaked with immunity from liability. A court clerk's negligent failure to carry out a court order did not subject the court clerk to liability because the clerk's act was considered the act of the judge who was not amenable to suit at common law. *Bradley v. Fisher*, 80 U.S. 646 (13 Wall. 335), 20 L.Ed. 646 (1872). This common law immunity for court clerks clearly survived the passage of the Civil Rights Act of 1871 as evidenced by the majority rule followed in Circuit Courts of Appeals that court clerks enjoy absolute immunity from §1983 damages liability.

The allegations in respondent's §1983 complaint against petitioner all related to acts and injuries which are indistinguishable from the allegations in the majority of cases barring similar §1983 plaintiffs from

challenging court clerks' conduct performed within the scope of the clerk's judicial employment. Every Circuit Court of Appeals, except the Fourth Circuit, has found the court clerk immune from §1983 damages liability for acts done in the performance of the clerk's judicial or quasi-judicial functions. Neither the nature of the clerk's duties nor the manner of performance has been a factor in the determination of the clerk's immunity when the act was performed under a judge's supervision and intimately related to judicial proceedings.

The majority of Circuits implicitly recognized that the judicial immunity doctrine embraces the reality that errors will be committed by clerks in courts with overcrowded dockets. Court clerks, indispensable aides of the court, must have the freedom as judges to discharge their duties. To deny court clerks the immunity enjoyed by the judges in a legal system presently subjected to unprecedented strains, would instill in all clerks the fear that one inadvertent mistake will subject the clerk to §1983 liability damages, will inhibit the clerk's active interest to contribute toward positive improvements to the administration of the judicial system, and as a result will deny the public its right to the most efficient administration of the judicial process. Immunity shields the petitioner when he aids the judge he serves by devising procedures best suited in the petitioner's judgment, to implement judicial orders including those orders recalling warrants.

Available alternatives to §1983 liability for clerks of the court provide superior methods for insuring that the public is able to remedy a court clerk's conduct. A clerk who wilfully deprived someone of constitutional rights can be punished criminally. *See* 18 U.S.C. §242. In Il-

linois, a court clerk can be punished criminally for failing to timely enter of record any order of his court and can be removed from office for any subsequent failure to comply with his statutory duties. Ill. Rev. Stat. 1979, ch. 25, §15. *See also* Ill. Rev. Stat. 1979, ch. 25, §4. These federal and state remedies, therefore, protect the public from the acts of clerks of the court who, contrary to the allegations in this case, wilfully acted beyond the scope of their authority or, who in the absence of judicial directives, wilfully failed to comply with statutory duties.

The District Court properly granted summary judgment for the petitioner where no genuine issue of material fact existed. Fed.R.Civ.P. 56(e). The petitioner's uncontroverted affidavits and documents clearly supported the District Court's conclusion "that the warrant recall procedures of the Circuit Court of Cook County are not unconstitutional as applied to the allegations of the plaintiffs' complaint." (Pet. Cert. App. B at 18a) No further clarification of the facts was necessary to determine whether the petitioner was entitled to absolute judicial immunity for acts performed pursuant to court order.

ARGUMENT

ABSOLUTE JUDICIAL IMMUNITY SHIELDS THE CLERK OF THE CIRCUIT COURT OF COOK COUNTY FROM §1983 DAMAGES LIABILITY WHEN THE CLERK PERFORMS JUDICIAL OR QUASI-JUDICIAL FUNCTIONS.

The petitioner's entitlement to absolute judicial immunity from §1983 damages liability is the majority rule in the Circuits today.* The Seventh Circuit's leading decisions extending judicial immunity to court clerks like petitioner relied on this Court's decision in *Pierson v. Ray*, 386 U.S. 547 (1967). This Court held that the common law doctrine of judicial immunity for judges survived the Civil Rights Act of 1871. *Id. See Brown v. Dunne*, 409 F.2d 341 (7th Cir. 1969); *Dieu v. Norton*, 411 F.2d 761 (7th Cir. 1969); *Bradley v. Fisher*, 80 U.S. 646 (13 Wall. 335), 20 L.Ed. 646 (1872).

Despite the well-established extension of the judicial immunity doctrine to court clerks, the Seventh Circuit,

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* *Sullivan v. Kelleher*, 405 F.2d 486 (1st Cir. 1968); *Slotnick v. Garfinkle*, 632 F.2d 163 (1st Cir. 1980); *Blouin v. Dembitz*, 367 F.Supp. 415 (S.D.N.Y. 1973), *aff'd on other grounds*, 489 F.2d 488 (2d Cir. 1973); *Lockhart v. Hoenstine*, 411 F.2d 455 (3d Cir. 1969); *Steinpreis v. Shook*, 377 F.2d 282 (4th Cir. 1967); *Zimmerman v. Spears*, 428 F.Supp. 759 (W.D.Tex. 1977), *aff'd on other grounds*, 565 F.2d 310 (5th Cir. 1977); *Denman v. Leedy*, 479 F.2d 1097 (6th Cir. 1973); *Dieu v. Norton*, 411 F.2d 761 (7th Cir. 1969); *Brown v. Dunne*, 409 F.2d 341 (7th Cir. 1969); *Panko v. Rodak*, 606 F.2d 168 (7th Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980); *Davis v. McAteer*, 431 F.2d 81 (8th Cir. 1970); *Rhodes v. Houston*, 202 F.Supp. 624 (D.Neb. 1962), *aff'd*, 309 F.2d 959 (8th Cir. 1962), *cert. denied*, 372 U.S. 909 (1963); *Stewart v. Minnick*, 409 F.2d 826 (9th Cir. 1969); *Hamrick v. Norton*, 322 F.Supp. 424 (D.Kan. 1970), *aff'd*, 436 F.2d 940 (10th Cir. 1971). *Contra*, *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972); *Williams v. Wood*, 612 F.2d 982 (5th Cir. 1980).

in the instant case, retreated from its own precedent and refused to hold the petitioner, the Clerk of the Circuit Court of Cook County, absolutely immune from §1983 damages liability. This Court's reversal of the Seventh Circuit's holding below would establish the court clerk's entitlement to absolute judicial immunity, the majority rule, as the law of the land.

A. The Petitioner Is An Essential Officer Of The Court Who Enables The Court To Properly Perform Its Judicial Duties.

Judges recognize that "no court can discharge its judicial duties without the aid of clerks." *Blouin v. Dembitz*, 367 F.Supp. 415, 422 (S.D.N.Y. 1973), *aff'd on other grounds*, 489 F.2d 488 (2d Cir. 1973). Without dispute, the clerk is an integral part of the ever-expanding judicial machinery buckling under "unprecedented strains". *Polk County v. Dodson*, ... U.S. ....., 50 U.S.L.W. 4077, 4080 (No. 80-824, decided December 14, 1981). In Cook County, Illinois, one of the most populous areas in the country, petitioner's deputy clerks are present to assist each judge in the performance of the court's judicial duties. Every day of the year petitioner assists the Circuit Court of Cook County in the court's law, chancery, county, domestic relations, juvenile and criminal divisions as well as in the six municipal districts in Cook County. In the instant case, petitioner's deputy clerks were present to assist the court in the implementation of all court orders including warrant recall orders like the one involved in the instant case.

In 1975, respondent's misdemeanor case was one of over one-half million misdemeanor cases filed in the Circuit Court of Cook County. *1979 Annual Report to the Supreme Court of Illinois*, Administrative Office of the Illinois Courts, p. 39 (1979). The issuance of the warrant recall order in respondent's case was representative of

thousands of other warrant recall orders issued by the Circuit Court and implemented by the petitioner's deputy clerks.

General Order 74-8(M), issued on August 13, 1974, by the Presiding Judge of the First Municipal District of the Circuit Court of Cook County established procedures for warrant recall requests made either prior to or after entry of judgment on the bond forfeiture. (J.A. 23-24) The General Order required the clerk to "deliver the warrant recall to the Central Warrant Unit" of the Chicago Police Department. (J.A. 23) Beginning August 15, 1974, two days after the issuance of the Presiding Judge's Order, the petitioner instituted procedures to implement court order 74-8(M). (J.A. 19)

Petitioner's methods and procedures regarding warrant recall orders were formulated in 1974 by a joint committee of representatives from the Chicago Crime Commission, the judiciary, the Chicago Police Department, the Cook County State's Attorney's Office, and petitioner's office. (J.A. 17, 19) Deputy clerks were advised of the court's new warrant recall procedures by office memorandum. The petitioner's procedures were detailed in the petitioner's Operating Manual which was distributed among all deputy clerks. (J.A. 17, 19-21)

In 1974, the petitioner and the Presiding Judge created and implemented these procedures to insure notification to victims and police officers of new court dates and to insure notification to the police department of warrant recall orders. (J.A. 19) These procedures were in effect at the time of the respondent's arrest on the recalled warrant on March 25, 1975.

The respondent, while free on bond, failed to appear in court on the set court date. Ill. Rev. Stat. 1979, ch. 38, §110-10. (J.A. 31) The court ordered respondent's bail

forfeited, issued a bond forfeiture arrest warrant, and set a return date for entering judgment on the bond forfeiture order. Ill. Rev. Stat. 1979, ch. 38, §§110-7(h) and 110-3. (J.A. 31) Prior to entry of judgment respondent voluntarily appeared in court without notice to the complainant. The court sustained respondent's motions to quash the outstanding warrant and to vacate the bond forfeiture order. (J.A. 31) The court continued the case again after allowing respondent to remain free on bond.

The petitioner cooperated closely with the Presiding Judge in this case "in order that judicial duties may be properly accomplished." *Dennis v. Sparks*, 449 U.S. 24, 30 (1980). In the instant case, the act of the petitioner was the act of the court. *Ex parte Morgan*, 114 U.S. 174, 175 (1885). At common law, judicial immunity shielded clerks who performed similar judicial or quasi-judicial functions as though the court itself had performed the act.

B. Historical And Public Policy Considerations Are The Foundation For Petitioner's Absolute Immunity From §1983 Damages Liability.

In *Pierson v. Ray*, 386 U.S. 547 (1967) and *Imbler v. Pachtman*, 424 U.S. 409 (1976), this Court provided the framework for determining whether absolute judicial immunity shields petitioner. The liability of court clerks under §1983 must be determined in the same manner that this Court determined absolute legislative immunity (*Tenney v. Brandhove*, 341 U.S. 367 (1951)), judicial immunity (*Pierson v. Ray, supra*, 386 U.S. 547), and prosecutorial immunity (*Imbler v. Pachtman, supra*, 424 U.S. 409), as well as qualified official immunity (*Scheuer v. Rhodes*, 416 U.S. 232 (1974)).

In *Imbler v. Pachtman, supra,* 424 U.S. at 421 and 424, this Court held:

> Rather, each [case] was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common-law and . . . whether the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under §1983.

Within this framework, historical and public policy considerations insulate court clerks from liability for judicial or quasi-judicial acts.

In Illinois the office of the Clerk of the Court was created by Article IV, Section 6 of the Illinois Constitution of 1818. The Illinois Constitution allowed the circuit court to appoint the clerk if his office was vacant when the court was not in session "in order that the administration of justice might not be delayed for the want of so important an officer of the Court as a clerk." *People v. Mobley,* 2 Ill. 214, 221 (1835). The present Illinois Constitution continues to recognize the special relationship of the Clerk of the Court to the judiciary where the Clerk's Office, as well as the State's Attorney's Office, originate in the Judiciary Article. ILL. CONST. art. VI, §§18 and 19 (1970).

At common law, the clerk was clearly an officer of the court and not an executive or legislative officer. *People v. Brady,* 275 Ill. 261, 262-263 (1916). This Court consistently recognized that officers "within the ordinary meaning of that term . . . [included] . . . marshals, bailiffs, court clerks or judges." *Cammer v. United States,* 350 U.S. 399, 405 (1956). *See Shadwick v. City of Tampa,* 407 U.S. 345, 351 (1972) (A court clerk is a judicial officer "assigned to the . . . municipal court judge for whom he does much of his work."); *Ferri v. Ackerman,* 444 U.S. 193, 202 n.19 (1979) (The clerk is

an officer of the court); *cf. Haldane v. Chagnon*, 345 F.2d 601, 604 (9th Cir. 1965) (Bailiffs are "entitled to the protection of the judicial immunity which surrounded the whole court."); *Johnson v. Granholm*, 662 F.2d 449, 450 (6th Cir. 1981) ("Friends of the court" enjoyed absolute immunity from §1983 damages liability when failing to perform state statutory and court ordered quasi-judicial duties to insure that the plaintiff's former husband made child support payments as ordered in a divorce decree.).

The clerk historically performed custodial, clerical and court ordered functions. The "clerk of the court is an officer of the court who has charge of the clerical part of [the court's] business and keeps its records and seal, issues process, enters judgments and orders, [and] makes certified copies from the record." *People v. Brady, supra*, 275 Ill. at 262.

At common law, judges supervised the clerk's conduct in and out of the courtroom. *See Board of Supervisors of Peoria County v. Roche*, 65 Ill. 77 (1872). When recording judgments of the court, the clerk's "recording is in legal effect the act of the court, and subject to its judicial control." *Ex parte Morgan, supra*, 114 U.S. 174, 175 (1885). *Accord Commonwealth v. Thompson*, 65 Ky. (2 Bush) 559, 560 (1866). Illinois law required judges to inspect the clerk's office and to issue orders to the clerk regarding the operation of the clerk's office. Ill. Rev. Stat. 1845, p. 147, §39; Ill. Rev. Stat. 1979, ch. 25, §22. The court possessed its books, papers, and records through its clerk. "The clerk is a necessary adjunct and part of the court. His possession is the possession of the court." *In re Lyman*, 55 F. 29, 42 (S.D.N.Y. 1893).

In addition to the judiciary's control over its clerks, state legislatures enacted laws prescribing the clerk's

duties and responsibilities. *See* Ill. Rev. Stat. 1845, p. 147, §35; Ill. Rev. Stat. 1979, ch. 25, §13; *People v. Mobley, supra*, 2 Ill. at 225. Prior to the passage of the Civil Rights Act of 1871, the bulk of lawsuits filed in state courts against clerks were primarily actions on the clerk's surety bond.

Illinois state law, representative of the other states' bond laws, required the clerk of the court to post a surety bond "for faithful performance of the duties of his office, and to pay over all moneys that may come to his hands by virtue of his office, to the parties entitled thereto." Ill. Rev. Stat. 1979, ch. 25, §4; Ill. Rev. Stat. 1845, p. 144, §15. Pursuant to this statutory fiduciary contract with the state's litigants, court clerks "agree that they shall be responsible if he fails to perform his official duty, and it is for this purpose that the bond is required." *Governor v. Dodd*, 81 Ill. 162, 164 (1876). The bond statute, therefore, required the clerk to perform ministerial acts mandated by state law.

State courts which predicated the clerk's liability on the ministerial nature of the clerk's fiduciary duty to the parties, for example, to enter a verdict for the proper party or to accept a sufficient surety bond to cover a verdict on appeal, strictly construed the legislature's intent to allow this narrow recovery on the bond against the clerk. *See Lick v. Madden*, 36 Cal. 208 (1868); *Gullick v. New*, 14 Ind. 93 (1860); *State v. Merritt*, 65 N.C. 558 (1871); *Mann's Appeal*, 1 Pa. 24 (1845); *Pass v. Dibrell*, 16 Tenn. (8 Yerg.) 470 (1835); *Clark v. Wilcox*, 31 Tex. 32[2] (1868); and *Russel v. Clayton*, 7 Va. (7 Call.) 41 (1801).

In Illinois, however, prior to 1871, in order to maintain an action against the clerk for approving a bond with insufficient surety, the Illinois Supreme Court re-

quired the plaintiff to allege that the clerk acted wilfully and maliciously. *Billings v. Lafferty*, 31 Ill. 318, 322 (1863). *See also McFarlan v. People*, 13 Ill. 9 (1851). In Massachusetts, no right of action existed on the clerk's bond where there was "nothing in the act which shows a design to protect individual sufferers against the negligence of the clerk to pay over moneys which may come into his hands." *Crocker v. Fales*, 13 Mass. 260, 261 (1816). The clerk's liability, therefore, was a function of statutory construction. Clerks were not always strictly liable on their bond for failure to perform ministerial duties required by state law.

The body of pre-1871 common law which evolved from actions on the clerk's bond clearly expressed the narrow view that when clerks acted in a fiduciary relationship with litigants, the plaintiff could recover on the clerk's bond if the clerk's conduct prevented the plaintiff from recovering against the defendant in the underlying tort or contract action. At common law, the clerk's judicial relationship with the court, however, remained superior to the unique fiduciary relationship with private litigants.

State courts which found the court clerk liable at common law for failure to perform an act considered ministerial did so because the act was mandated by the bond statute rather than because the act was required to be performed under the direction of the judge. The clerk was immune from liability when performing acts ordered by the court. At common law a presumption existed that matters which the clerk was required to submit to the judge for approval were performed under the direction and with the approval of the judge. *The Philadelphia Wilmington & Baltimore Railroad Company v. Howard*, 13 How. 305, 331, 14 L.Ed. 157, 168 (1851). *See also* 11 C.J. Clerks of Courts, §91 (1917)

A court-ordered act performed by the clerk was a judicial or quasi-judicial act not a ministerial act. At common law "the only reasonable construction to be given to this language [of the statute] is, that all these acts, thus required of the clerk, are to be performed by him as clerk, acting ministerially, under the direction of the law, and not under the direction of the court; and they may be done as well out of court, as in court." *People v. Fletcher*, 3 Ill. 482, 488 (1840).

A court clerk acting pursuant to a general order of the Circuit Court was excused from liability for failing to comply with a state statute. *Davidson v. Wiley Bank & Co.*, 31 Ala. (Book 25) 452 (1858). When the court directed the clerk to enter a judgment "he will not be a wrong-doer for following such directions, even if they prove in the end to be erroneous . . . and the law will protect him in so doing." *Hoeffner v. Stratton*, 57 Me. 360, 362 (1869).

At common law, a clerk was not liable for damages caused by his mistake in failing to enter judgment. *Commonwealth v. Thompson, supra*, 65 Ky. at 560. A clerk's mistake was not "fraud, culpable negligence, or willful wrong." *Id.* The Kentucky Supreme Court concluded:

> [T]he orders and judgments drawn by him, although erroneous and prejudicial to the rights of parties, are, when approved and signed by the court, to be presumed to be the acts of the court rather than the clerk, for which, for obvious reasons, and on well-settled principles, no right of action exists.
>
> *Id.* at 560.

The clerk's negligence, therefore, was no exception to the clerk's immunity from liability. *See also Billings v. Lafferty, supra*, 31 Ill. 318 (1863). The act of the clerk was the act of the court. *Thompson, supra*, 65 Ky. at 560;

Ex parte Morgan, supra, 114 U.S. at 175. The clerk was no more liable for damages than the court if the court had performed the act it had ordered the clerk to perform. Prior to 1871, despite the ministerial label attached to the clerk's duties, the clerk's primary relationship with the court became the judicial source of the clerk's immunity.

Recent common law decisions reinforce the historical application of the doctrine of judicial immunity to court clerks who performed ministerial acts pursuant to court order (*Yamamoto v. Santa Cruz County Board of Supervisors,* 124 Ariz. 538, 606 P.2d 28 (Ct. App. 1980)), judicial functions (*City of Louisville v. Bergel,* 610 S.W.2d 292 (Ky. 1980)), and quasi-judicial acts (*Rodriguez v. State of New York,* 55 Misc.2d 669, 285 N.Y.S.2d 896 (N.Y. Ct. Cl. 1967)). Neither the manner of the performance nor the ministerial nature of the act affected the absolute immunity of the court clerk from liability.

In *Yamamoto, supra,* 124 Ariz. at 540, the Arizona Appellate Court relied on *Dieu v. Norton, supra,* 411 F.2d 761 (7th Cir. 1969), the leading Seventh Circuit §1983 court clerk immunity decision, to support the Appellate Court's holding for the court clerk. The Kentucky Supreme Court relied on *Shadwick v. City of Tampa, supra,* 407 U.S. 345 (1972), as controlling authority for the clerks' immunity. *City of Louisville, supra,* 610 S.W.2d at 293. The Kentucky Supreme Court held that the court clerks' erroneous issuance and approval of an arrest warrant was "done in due course of their employment, [and] were judicial functions . . . This being true, under familiar principles of judicial immunity neither [clerk] is liable." *Id.*

In *Rodriguez, supra*, 55 Misc.2d 669, the claimant filed an unlawful imprisonment action against the State of New York based on the following facts. A judge signed an order discharging the claimant from a sentence of probation while he was serving a prison sentence for an unrelated offense. The clerk of the court failed to notify the New York Department of Corrections of the probation termination order. Nearly one year later, however, after Rodriguez completed his prison sentence, the Department of Corrections, believing that he was still on probation, arrested the claimant for violating the previously terminated probation. A judge other than the one who placed Rodriguez on probation found him guilty of violating his previously terminated probation and sentenced the claimant to serve four months in custody. In addition to his damages claim, Rodriguez claimed that he contracted tuberculosis while in custody on the violation due to the state clerk's alleged negligence, malfeasance, and carelessness. The trial court dismissed the action against the court clerk.

On appeal, the New York Court of Claims affirmed the dismissal. The Court held:

> Courts have stated it to be the law by which this court must be bound that a County Court Clerk, as part of a court that had been absorbed into the State judicial system, is protected from the consequences of acts which are quasi-judicial in nature and require the exercise of judgment and discretion as also are such acts of a County Judge.
>
> The Court finds the Clerk's duty of notification that probation had ended to be a quasi-judicial act related to the sentencing process. Thus it differs from duties of the Clerk to keep and certify records, which duties have been classified as ministerial in nature. *Id.* at 673-674.

The *Rodriguez* court granted the clerk judicial immunity based on the same historical and public policy reasons supporting judicial immunity for judges:

> Harsh though the application of the rule of judicial immunity may seem, it is essential to bear in mind the comment of Judge Learned Hand in *Gregoire v. Biddle*, (177 F.2d 579, 581) that liability under such circumstances "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Id.* at 674.

In addition to these policy considerations the court relied on *Yates v. Lansing*, 5 Johns. 282 (N.Y. 1810),* recognized by this Court as the earliest American judicial immunity decision at common law prior to the Civil Rights Act of 1871. *See Imbler v. Pachtman, supra*, 424 U.S. at 423 n. 20. The "doctrine which holds a judge exempt from a civil suit or indictment, for any act done, or omitted to be done, by him, sitting as judge has a deep root in the common law" for clerks as well as judges and prosecutors. *Yates v. Lansing, supra*, 5 Johns. at 291; *Imbler v. Pachtman, supra*, 424 U.S. at 423 n. 20.

Only one §1983 decision, *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972), has failed to recognize that clerks historically "were protected by the traditional doctrine of judicial immunity, and this rule of law was not abolished by §1983." *Dieu v. Norton, supra*, 411 F.2d at 763, citing *Pierson v. Ray, supra*, 386 U.S. at 553-555. The *McCray* decision represents the only §1983 Circuit Court of Appeals decision refusing to apply judicial immunity to court clerks due to the ministerial nature of those duties performed by the clerk not required by

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* In *Rodriguez v. State of New York, supra*, 55 Misc.2d at 674, the court relied on *Fishbein v. State of New York*, 204 Misc. 151, 154 (Ct.Cl. 1953), which cited *Yates v. Lansing, supra*, 5 Johns. 282, in a judicial immunity decision.

court order. This decision represents the minority rule in the Circuits on the clerks' immunity and is contrary to the well-established common law foundation for the clerks' judicial immunity from §1983 liability. This common law immunity clearly survived the passage of the Civil Rights Act of 1871 as evidenced by the majority rule followed in Circuit Courts of Appeals that court clerks enjoy absolute immunity from §1983 damages liability.

C. The Petitioner's Absolute Judicial Immunity From §1983 Liability Is The Majority Rule Followed By The Circuit Courts Of Appeals.

Respondent's §1983 complaint alleged that petitioner was liable for damages because petitioner's deputy clerks' negligent failure to notify the Chicago Police Department that the court had recalled respondent's arrest warrant caused her arrest, custodial strip-search and seven hour detention on the recalled warrant. Petitioner is not alleged to have personally failed to communicate, supervise, or implement respondent's warrant recall order. Petitioner cannot be held liable on the basis of *respondeat superior* and could have been properly dismissed on that ground. *Rizzo v. Goode*, 423 U.S. 362, 370-371, 375-377 (1976); *Monell v. Department of Social Services*, 436 U.S. 658, 690-695 (1978); and *Polk County v. Dodson, supra*, 50 U.S.L.W. at 4080-4081 (A "general allegation of administrative negligence fails to state a constitutional claim cognizable under §1983."). *See also Murray v. City of Chicago*, 634 F.2d 365, 367 n. 4 (7th Cir. 1981) ("Mere negligence, of course, will not support a §1983 action against Finley. See *Bonner v. Coughlin*, 545 F.2d 565, 568 (7th Cir. 1976).")

The petitioner's absolute judicial immunity from damages liability is an equally compelling ground for

dismissal of respondent's §1983 complaint. The allegations in the complaint against the petitioner all related to acts and harm which are indistinguishable from the allegations in the majority of cases barring similar §1983 plaintiffs from challenging court clerks' conduct performed within the scope of the clerk's judicial employment.

The First Circuit affirmed the summary judgment for the court clerk who allegedly failed to give the plaintiff tenant legal notice of a court ordered eviction. However, judicial immunity prevented the court clerk from being "held personally liable for any defects in service of process, if indeed there were such defects." *Sullivan v. Kelleher*, 405 F.2d 486, 487 (1st Cir. 1968). In *Slotnick v. Garfinkle*, 632 F.2d 163 (1st Cir. 1980), the First Circuit upheld the court clerk's motion to dismiss where the clerk issued altered criminal commitment papers for the plaintiff's admission to a hospital. The First Circuit held that where the court clerk carried out "the official directives of a judge" the clerk enjoyed judicial immunity. *Id.* at 166.

The Second Circuit affirmed the District Court's grant of summary judgment for the court clerk who implemented the Family Court's procedure to issue arrest warrants for husbands who failed to appear in response to summons served by mail. *Blouin v. Dembitz*, 367 F.Supp. 415, 422 (S.D.N.Y. 1973), *aff'd on other grounds*, 489 F.2d 488 (2d Cir. 1973). The Third Circuit affirmed the District Court's dismissal of a §1983 complaint against the Clerk of the Pennsylvania Supreme Court who failed to file the plaintiff's disciplinary petition against a lower court judge pursuant to the Chief Justice's order and direction. The District Court held:

> Thus, assuming that the failure to file said petition was patently violative of complainant's civil rights,

no basis in law exists whereby civil liability can be imposed upon a public official acting pursuant to court order and direction. *Ginsburg v. Stern*, 125 F.Supp. 596, 603 (W.D. Penn. 1955), *aff'd*, 225 F.2d 245 (3d Cir. 1955).

Cf. Smith v. Rosenbaum, 460 F.2d 1019, 1020 (3rd Cir. 1972) (The court clerk was protected by §1983 judicial immunity when performing ministerial acts mandated by state statute.); *Lockhart v. Hoenstine*, 411 F.2d 455 (3rd Cir. 1969).

The Fifth Circuit affirmed the District Court's order dismissing the §1983 complaint against the District Court Clerk who "judicially" enforced Internal Revenue Service summonses directed to the plaintiffs. *Zimmerman v. Spears*, 428 F.Supp. 759 (W.D. Tex. 1977), *aff'd on other grounds*, 565 F.2d 310 (5th Cir. 1977). The Court held that "clerks of the court are also entitled to immunity the same as judges when performing their duties." *Id.* at 762. *But see Williams v. Wood*, 612 F.2d 982 (5th Cir. 1980).

The Sixth Circuit affirmed the District Court's ruling granting the court clerk's motion to dismiss where the clerk improperly failed to fix the plaintiff's bail following his arrest. The Sixth Circuit held that where the act was performed within the scope of his official quasi-judicial duties, the clerk was entitled to immunity. *Denman v. Leedy*, 479 F.2d 1097, 1098 (6th Cir. 1973).

In *Panko v. Rodak*, 606 F.2d 168, 171 (7th Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980), the Seventh Circuit held that the Clerk of this Court and his deputy were entitled to judicial immunity from damage liability for their docketing actions because the Clerk of this Court and his deputy were official aides of the Court when "carrying out judicial or quasi-judicial functions within

their authority." Similarly, in the instant case, warrant recall orders are unquestionably part of the circuit court's judicial functions. In enforcing and executing the court orders, the petitioner clearly carried out judicial and quasi-judicial functions within his authority. *See also Dieu v. Norton, supra,* 411 F.2d 761, and *Brown v. Dunne, supra,* 409 F.2d 341.

In *Davis v. McAteer,* 431 F.2d 81 (8th Cir. 1970), the clerk lost certain court files that would have corroborated the plaintiff's claim that his drug induced guilty plea was invalid. The Eighth Circuit affirmed the District Court clerk's motion to dismiss, holding that "clerks of courts are entitled to immunity the same as judges." 431 F.2d at 83. *See also Rhodes v. Houston,* 202 F.Supp. 624 (D. Neb. 1962), *aff'd,* 309 F.2d 959 (8th Cir. 1962), *cert. denied,* 372 U.S. 909 (1963).

The Ninth Circuit affirmed the District Court's order dismissing the plaintiff's §1983 complaint against the court clerk who refused to furnish the plaintiff a portion of his state criminal trial transcript. The Court held that the act charged to the clerk was an act performed in his capacity as a quasi-judicial officer and that the clerk was clothed with judicial immunity. *Stewart v. Minnick,* 409 F.2d 826 (9th Cir. 1969).

In another Ninth Circuit §1983 decision the Court held:

> At best, [plaintiff] has charged [the court clerk] with some kind of responsibility for her failure to receive notice of the May 5, 1975, order [depriving her of custody of her son]. His failure, if any, to perform a ministerial duty which was a part of judicial process is also clothed with quasi-judicial immunity.

Morrison v. Jones, 607 F.2d 1269, 1273 (9th Cir. 1979).

Thus, whether the clerk's duty is described as ministerial or judicial, the majority rule is that petitioner's failure to notify the Chicago Police Department did not deprive him of his judicial or quasi-judicial immunity from §1983 liability.

Finally, the Tenth Circuit affirmed the District Court's ruling granting the court clerk's motion to dismiss where the clerk failed to send a certified copy of the plaintiff's notice of appeal to the Clerk of the Kansas Supreme Court pursuant to a statutory duty. The District Court held that this act did not state a cause of action where "there are authorities which prescribe that clerks of court are immune from liability under 42 U.S.C. §1983, for acts done in performance of their official duties." *Hamrick v. Norton*, 322 F.Supp. 424, 426 (D. Kan. 1970), *aff'd*, 436 F.2d 940 (10th Cir. 1971).

In each of the above cases the Court found the clerk immune from §1983 damages liability for acts done in the performance of the clerk's judicial or quasi-judicial functions. These decisions recognized that judicial immunity for court clerks transcended labelling the clerk's duties as ministerial in order to fix liability. In *Brown v. Dunne*, *supra*, 409 F.2d 341, 343, the Seventh Circuit held:

> But if the term ministerial is used as the Court in *Ex Parte Virginia*, 100 U.S. 339, 348, 25 L.Ed. 676 (1879) used it, it is plain that the charges [of mere errors or irregularities] against the judge, magistrate and clerks comprehend judicial rather than ministerial functions, and therefore, do not remove their official immunity.

The nature of the clerk's duties was not a factor in the determination of the clerk's immunity where "those performing ministerial acts under a judge's supervision and intimately related to judicial proceedings have quasi-

judicial immunity." *Ashbrook v. Hoffman*, 617 F.2d 474, 477 n. 4 (7th Cir. 1980).

Therefore, contrary to the Seventh Circuit's own precedent, the determination of the clerk's immunity was ripe for decision, not "premature". *Murray v. City of Chicago*, 634 F.2d 365, 367 n. 4 (7th Cir. 1981). The petitioner's notification of warrant recall orders was clearly performance of a quasi-judicial function required by court order and intimately related to judicial proceedings, thus entitling petitioner to absolute immunity.

In the absence of absolute immunity, clerks, like petitioner, knowing that an error in judgment will subject them to §1983 liability, will have no incentive to make decisions or suggestions to judges to promote the efficient administration of the judicial system. In the instant case, the petitioner, based on his experience, possessed the most insight into the problems of bond forfeitures and warrant recalls, and was in the best position to advise the Presiding Judge and the interested law enforcement groups which procedures would solve the notification problems. In the absence of immunity, however, only the Clerk of the Court will be liable if the bond forfeiture and warrant recall procedures recommended, created and implemented by the Clerk do not work one-hundred per cent of the time and in every case. The judicial immunity doctrine implicitly recognizes that errors will occur, especially in courts with overcrowded criminal dockets, so that indispensable court aides, like the petitioner, will have the freedom to make the best, if not necessarily perfect, decisions intended to benefit the court and the public, both of which clerks serve daily.

To deny court clerks the immunity enjoyed by the judges in a legal system presently subjected to un-

precedented strains, would instill in all clerks the fear that one inadvertent mistake will subject the clerk to §1983 liability, would inhibit the clerk's active interest to contribute toward positive improvements to the judicial system and, as a result, would deny the public their right to the most efficient administration of the judicial process. Denying absolute immunity to petitioner would fly in the face of policy considerations dictating the immunity and "disserve the broader public interest." *Imbler v. Pachtman, supra,* 424 U.S. at 427.

Immunity will shield the petitioner when he aids the judge he serves by devising procedures best suited, in the petitioner's judgment, to implement judicial orders including those orders recalling warrants. In turn, in the instant case, immunity will also accomplish the petitioner's ultimate dual purposes for the procedures, the assurance that the Chicago Police Department will be notified of recalled arrest warrants in order to protect the public from arrests based on recalled arrest warrants and the assurance that crime victims will be notified of new court dates caused by defendants who, like respondent, fail to appear in court and, thus, delay the proceedings.

Respondent's §1983 complaint attempts to establish that the petitioner is not absolutely immune by making bald conclusory allegations of an official policy based on the petitioner's notification procedures which did not communicate her single warrant recall order to the police. These conclusory allegations, however, reinforce the petitioner's need for absolute judicial immunity for acts performed pursuant to judicial order.

Public policy and historical considerations clearly establish that the petitioner enjoys the same judicial im-

munity shielding the judge who issued the warrant recall order in this case. The petitioner respectfully requests this Court to reverse the judgment of the Seventh Circuit and hold that the petitioner is absolutely immune from §1983 damages liability.

D. Available Alternatives To §1983 Liability For Clerks Of The Court Provide Superior Methods For Insuring That The Public Is Able To Remedy A Court Clerk's Misconduct.

In addition to the historical and public policy arguments establishing judicial immunity for court clerks, the fundamental question arises as to the overall necessity for allowing a §1983 damages suit as a remedy for a person injured by a court clerk's action or inaction. As with prosecutors, legislators and judges, the public is not powerless to remedy the misconduct of a court clerk and to punish that which occurs. In *Imbler v. Pachtman, supra*, 424 U.S. at 429, this Court emphasized the following:

> This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. §242, the criminal analog of §1983. *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974); *cf. Gravel v. United States*, 408 U.S. 606, 627 (1972).

Therefore, a clerk of the court will "fare no better for his willful acts" than judges or prosecutors. *Id.*

Illinois provides for criminal punishment of a court clerk "who fails to enter of record any order, judgment or decree of his court within 45 days after the same is made or rendered . . ." Ill. Rev. Stat. 1979, ch. 25, §15.

Furthermore, the same statute provides that the clerk may be removed from his office for any subsequent failure to comply with the mandatory provisions of the statute. *Id. See also* Ill. Rev. Stat. 1979, ch. 33, §33 and ch. 110, §62. *Cf.* Ill. Rev. Stat. 1979, ch. 38, §110-7(d).

Another section of the statute requires that every Clerk of the Court in Illinois post a bond, with one or more sureties, not less than $5,000 which is payable to the People of the State of Illinois upon a showing that the clerk or his deputies failed to execute the fiduciary duties of the clerk's office. Ill. Rev. Stat. 1979, ch. 25, §4.

The Illinois courts have historically held:

> [T]he bond is given to protect not only the interests of the county, but to protect the interests of any one who may be injured by the official acts of the clerk. "The object of an official bond is to obtain indemnity against the misuse of an official position for wrong purposes; and that which is done under color of office, and which would obtain no credit, except for its appearing to be a regular official act, is within the protection of the bond and must be made good by those who sign it." Murfree on Official Bonds, Sec. 211. *People v. Brown*, 194 Ill.App. 246, 250 (4th Dist. 1915); *appeal dismissed*, 272 Ill. 146 (1916).

These federal and state remedies, therefore, exist to protect the public from the acts of clerks of the court who wilfully act beyond the scope of their authority or, who in the absence of judicial directives, wilfully fail to comply with their statutory duties. As in *Imbler v. Pachtman, supra*, 424 U.S. at 429, these "checks undermine the argument that the imposition of civil liability is the only way to insure" that clerks of the court are mindful of the constitutional rights of the public. This Court, therefore, should uphold the ruling of the District Court and hold that clerks of the court are entitled to the same absolute immunity enjoyed by judges and prosecutors.

E. The District Court Properly Granted Summary Judgment For The Petitioner Where No Genuine Issue Of Material Fact Existed That The Petitioner Enjoyed Absolute Judicial Immunity.

The District Court granted summary judgment in favor of the petitioner. On appeal the Seventh Circuit Court of Appeals reversed and remanded the cause for "further clarification of the facts . . . to consider whether Finley is entitled to assert the defense of official immunity." *Murray v. City of Chicago*, 634 F.2d 365, 367 n. 4 (7th Cir. 1981). The petitioner submits that the Seventh Circuit erred in reversing the District Court's order granting summary judgment on behalf of the petitioner as the District Court's grant of summary judgment was clearly based on the petitioner's uncontroverted affidavits and documents which established the absence of a genuine issue of material fact and that the petitioner enjoyed absolute judicial immunity. Fed.R.Civ.P. 56(e).

Previous civil rights immunity decisions amply support the District Court's decision to grant summary judgment where the petitioner's immunity from liability was clear from the record. *See* 6 J. Moore, *Federal Practice* ¶56.17 [8.-1] at 56-763 n. 1 (2d ed. 1966); *Imbler v. Pachtman, supra*, 424 U.S. at 419 n. 13. In *Lockhart v. Hoenstine, supra*, 411 F.2d 455 (3d Cir. 1969), the Third Circuit affirmed the District Court's grant of summary judgment for the Prothonotary of the Superior Court of Pennsylvania. The Court held that the court clerk was absolutely immune from §1983 liability when his act depriving the *pro se* plaintiff access to appellate review was performed pursuant to court directive. As in *Lockhart*, summary judgment was required in the instant case where the District Court properly compared the petitioner's uncontroverted materials with the un-

supported allegations in respondent's complaint. *Id.* at 458-459.

The District Court carefully examined the warrant recall procedures as reflected in the petitioner's two documents and two affidavits detailing warrant recall procedures generally and respondent's specific warrant recall order in particular. (Pet. Cert. App. B at 18a) The District Court observed that the respondent did not file any opposing affidavits but, instead, relied solely on the "conclusory" allegations in her complaint. (Pet. Cert. App. B at 18a) The District Court held:

> In the absence of such specific allegations [how the warrant recall procedures were unconstitutional or how the petitioner's procedures proximately caused an unconstitutional act] the Court must conclude that the warrant recall procedures of the Circuit Court of Cook County are not unconstitutional as applied to the allegations of the plaintiff's complaint.
>
> The Court is unable to determine that any genuine issue of material fact exists in this case that would result in any judgment other than one for the defendant. *Kiess v. Eason*, 442 F.2d 712, Seventh Circuit, 1971. (Pet. Cert. App. B at 18a-19a)

In light of the District Court's foregoing careful application of Rule 56 to the record before it, the District Court, therefore, properly granted summary judgment for the petitioner.

Finally, the petitioner clearly required no more discovery from the respondent than the taking of her deposition in order to file his motion for summary judgment. Rule 56(e) neither required the petitioner to defer filing, nor required the District Court to defer ruling, on the petitioner's summary judgment motion until the respondent decided to file interrogatory requests or

notices of depositions. In fact, respondent failed to initiate any discovery in the eight months between the date the complaint was filed and the granting of summary judgment.

As in *Lockhart, supra*, 411 F.2d 455, no further clarification of the facts was necessary to determine whether the petitioner was entitled to absolute judicial immunity for acts performed pursuant to court order. As in the majority of Circuits, the District Court properly refused to permit the issues of the petitioner's §1983 liability and immunity to proceed past the pleading stage where, as in *Polk County v. Dodson, supra*, 50 U.S.L.W. at 4081, the complaint failed to allege that the petitioner's procedures were "constitutionally forbidden." Since the petitioner's uncontroverted affidavits and documents established petitioner's entitlement to absolute judicial immunity within the meaning of Rule 56(e), this Court should hold that summary judgment was properly granted for petitioner and reverse the Seventh Circuit's decision to the contrary.

CONCLUSION

For the foregoing reasons, Morgan M. Finley, the Clerk of the Circuit Court of Cook County, respectfully submits that this Court should reverse the judgment of the Seventh Circuit Court of Appeals, should uphold the order of the District Court granting summary judgment for the petitioner, and hold that the petitioner is entitled to absolute judicial immunity.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois,

Petitioner,

vs.

TONI MURRAY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED*

Whether absolute judicial immunity shields the Clerk of the Circuit Court of Cook County from liability under 42 U.S.C. §1983 for the damages resulting from his failure to fulfill his duty of causing the court order recalling respondent's arrest warrant to be transmitted to the police.

*Petitioner's Brief substantially changes the substance of the Question Presented as stated in his Petition for Certiorari. By now portraying the issue before this Court as that of whether petitioner should be absolutely immune "when performing judicial or quasi-judicial functions," petitioner would have his immunity depend upon how he labels his duties, rather than, as respondent believes appropriate, upon the functional character of his allegedly unconstitutional conduct.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2205

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois,

Petitioner,

vs.

TONI MURRAY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Why the judge's order recalling respondent's arrest warrant was not delivered to the police department is a

mystery. Petitioner's assertion that his deputy clerks "unquestionably followed" three of the four procedures for handling warrant recall orders, Pet. Br. 7, does not help solve the mystery since their evident failure to accomplish the "fourth procedure" for sorting and delivering the orders rendered their obedience to petitioner's other procedures futile.

Nothing in the record supports petitioner's surmise that respondent's recall order was either "lost in the mail or. . . was inadvertently lost somewhere between the courtroom and petitioner's office." Pet. Br. 7. Petitioner's affidavits show neither what happened to respondent's recall order after a deputy clerk placed it in an "out basket" nor what procedures were generally followed for sorting and delivering such orders. The evidence, therefore, may show that the police never received respondent's recall order as much because of the "mail" or inadvertence as because of the haphazard nature of petitioner's procedures for sorting and delivering such orders.

Petitioner's argument that the failure to communicate respondent's "single warrant recall order to the police" evidences only "one inadvertent mistake" and does not justify respondent's allegations of a custom or policy of such mistakes, Pet. Br. 11, 30-31, is similarly unsupported by the record. The extent to which petitioner's procedures for handling warrant recall orders were responsibile for the Police Department's failure to receive either respondent's recall order or any of the "thousands of other warrant recall orders issued by the Circuit Court and implemented by petitioner's deputy clerks," Pet. Br. 15, must await factual clarification.

Finally, the inference petitioner would draw as to the efficacy of his general procedures for handling warrant recall

orders is unjustified not only because it is unsupported by the record and impermissably indulges factual inferences in favor of the party moving for summary judgment, *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 158-59 (1970), but also because it is irrelevant to the Question Presented of whether petitioner is entitled to absolute immunity from damages. If an official is granted absolute immunity, he is afforded such protection notwithstanding this Court's assumption that he committed the constitutional violation alleged. *See infra* Part V, pp. 51-52.

SUMMARY OF ARGUMENT

Petitioner has not met his burden of demonstrating any of the grounds necessary to establish his entitlement to immunity. First, he has not shown that he needs absolute immunity in order to perform the official functions here at issue. Without further factual clarification it cannot be determined which of the various functions he may have performed in regard to the recall of arrest warrants actually caused respondent's unconstitutional arrest. The various duties of his office that petitioner does claim to have performed, however, all involve activities of a ministerial or administrative nature, which have heretofore been accorded either no immunity or, at most, a qualified immunity.

Second, petitioner has not established that court clerks were entitled to a common law immunity in 1871 equivalent to that which he now claims under § 1983. It was then firmly established that court clerks had no immunity for their negligent or wilful failure to perform ministerial duties, even when those duties required the exercise of wide discretion.

Finally, petitioner has not met his burden of establishing that any degree of immunity is so essential to the per-

formance of court clerks' duties that Congress cannot be presumed to have intended that the general language of § 1983 override that immunity. To the extent that petitioner may be found liable for the failure to perform ministerial duties, he would deserve no immunity whatever since the only purpose of an immunity of any kind is to protect officials' ability to exercise their discretion in the public interest.

Even if petitioner exercised substantial discretion, however, he is not entitled to an absolute immunity. Petitioner has presented no evidence to support his implausible contention that absolute immunity is essential to the performance of his duties. Petitioner's duties, as well as the administrative and ministerial duties of court clerks generally, are also not functionally comparable to the adjudicative duties of judges and judge-like officials, who are the actors in the judicial process who have heretofore had the exclusive protection of absolute immunity from damages. Furthermore, court clerks who violate constitutional rights by failing to perform their administrative or ministerial duties are not subject to the procedural safeguards inherent in judicial-type processes. The presence of such safeguards has always been a prerequisite for the grant of absolute immunity since without them individuals would have no protection from officials who have no compunction about violating constitutional rights.

ARGUMENT

I.

PETITIONER HAS NOT MET HIS BURDEN OF DEMONSTRATING THAT

HE HAS PERFORMED ANY FUNCTIONS REQUIRING THE PROTECTION OF ABSOLUTE IMMUNITY.

Petitioner maintains that he is entitled to immunity because he is an officer of the court and an essential aide to the judge. Pet. Br. 14-16. An official's entitlement to immunity, however, has always depended upon the nature of his duties, not upon his title or location in the government. *Butz v. Economou,* 438 U.S. 478, 506 (1978); *Stump v. Sparkman,* 435 U.S. 349, 361-62 (1978); *Imbler v. Pachtman,* 424 U.S. 409, 430-31 (1976); *Scheuer v. Rhodes,* 416 U.S. 232, 247 (1974) (quoting *Barr v. Matteo,* 360 U.S. 564, 573-74 (1959)); *Ex Parte Virginia,* 100 U.S. 339, 348 (1879); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 170-71 (1803). Petitioner's central argument, therefore, stands on the same footing as the often rejected argument that congressional aides, officers, and functionaries should be immune because they play an essential role in the conduct of legislative duties. *Doe v. McMillan,* 412 U.S. U.S. 306, 315-17 (1973); *Gravel v. United States,* 408 U.S. 606, 618 (1972); *Powell v. McCormack,* 395 U.S. 486, 504 (1969); *Dombrowski v. Eastland,* 387 U.S. 82, 85 (1967); *Kilbourn v. Thompson,* 103 U.S. 168 (1881). The issue in this case is thus not whether court clerks are important, but whether the nature of their activities requires an inference that Congress intended them to be protected from suit under 42 U.S.C. §1983 (hereafter §1983).

It is petitioner's burden to establish his entitlement to immunity from damages under §1983. *Dennis v. Sparks,* 449 U.S. 24, 29 (1980); *Butz v. Economou,* 438 U.S. 478, 506 (1978). To satisfy that burden he must demonstrate first, that court clerks had an equivalent common law

immunity when the predecessor of §1983 was enacted; second, that court clerks generally perform the types of functions that require the protection of immunity; and third, that petitioner in fact performed such functions. Sections II and III below, pp. 10-39, address petitioner's failure to demonstrate the first two propositions, while this section addresses his failure to demonstrate the third proposition.

Petitioner maintains that he acted here as an aide to the presiding judge in the exercise of that judge's general administrative authority.[1] Pet. Br. 15. As shown in Section III, *infra* at 23-49, acts of an official that are of an executive, administrative, or ministerial nature have been held to deserve no immunity or, at most, a qualified immunity.[2] Petitioner cannot demonstrate that he deserves any higher protection because the record does not reveal what he did here that might warrant such protection. Depending on facts

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[1]Illinois Supreme Court Rule 21(b) provides: "The chief judge of each circuit may enter general orders in the exercise of his general administrative authority. . . ." Article 6, §7 of the Illinois Constitution provides, *inter alia:* "Subject to the authority of the Supreme Court, the Chief Judge [in each circuit] shall have general administrative authority over his court. . . ." Petitioner maintains that his actions in this case were pursuant to a General Order of the Presiding Judge of the First Municipal District of the Circuit Court of Cook County that established procedures for warrant recall requests. Pet. Br. 15.

[2]See regarding a qualified immunity: *Butz v. Economou,* 438 U.S. 478 (1978) (federal executive officials as a general matter); *Procunier v. Navarette,* 434 U.S. 555 (1978) (prison administrators); *O'Connor v. Donaldson,* 422 U.S. 563 (1975) (state hospital administrator); *Wood v. Strickland,* 420 U.S. 308 (1975) (school board members); *Scheuer v. Rhodes,* 416 U.S. 232 (1974) (state Governor and various state executive officials); *Pierson v. Ray,* 386 U.S. 547 (1967) (policemen). See regarding no immunity: *McCray v. Maryland,* 456 F.2d 1, 5 (4th Cir. 1972); *Murray v. City of Chicago,* 634 F.2d 365, 367-68 (7th Cir. 1980) (Swygert, J. concurring) (Pet. Cert. App.A at 6a-7a).

not yet adduced, petitioner's liability may be based alternatively upon his deputies' failure to transmit to the police the judge's order recalling respondent's arrest warrant,[3] upon his own failure to implement the procedures

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[3]Illinois Rev. Stat. ch. 25, § 10 (1979) provides: "The principal clerk shall, in all cases, be responsible for the acts of his deputies." This statute has been interpreted to make "the clerk civilly responsible for the acts of his deputies. . . ." *People v. Gill*, 30 Ill. App.2d 32, 51, 173 N.E.2d 568, 577 (1961). This Court has not ruled on the question of whether a state law making a superior official liable for the actions of his subordinates is sufficient to establish the superior's liability in a § 1983 action where the superior did not personally participate in his subordinates' unconstitutional conduct. The language of 42 U.S.C. § 1988, however, and the interpretation this Court has given that language in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969), would indicate that the Illinois rule authorizing a damage remedy against petitioner for his deputies' unlawful acts should be utilized under § 1983, since it is the rule on damages that "better serves the policies expressed in the fedeal statutes." *Id.* Support for this conclusion is found in this Court's implicit approval of two circuit court decisions that held sheriffs liable under § 1983 for their deputies' wrongful acts on the theory that § 1988 authorized incorporating in the remedies available under § 1983 the state law making superiors liable for subordinates' misconduct. *Moor v. County of Alameda*, 411 U.S. 693, 704 n.17 (1973), *citing Hesselgesser v. Reilly*, 440 F.2d 901, 903 (9th Cir. 1971); *Lewis v. Brautigam*, 227 F.2d 124, 128 (5th Cir. 1955). *See also McDaniel v. Carroll*, 457 F.2d 968, 969 (6th Cir. 1972), *cert. denied*, 409 U.S. 1106 (1973); *Carter v. Carlson*, 447 F.2d 358, 368-70 (D.C. Cir. 1971), *rev'd on other grounds sub nom District of Columbia v. Carter*, 409 U.S. 418 (1973). *But see Baskin v. Parker*, 602 F.2d 1205 (5th Cir. 1979) and *id.*, at 1211-15 (Rubin, J., concurring in part and dissenting in part). In addition, since the Complaint alleges that petitioner himself did not fulfill his duty to communicate respondent's arrest warrant recall order to the police, Complaint, para. 16, J.A. 8, it is not beyond doubt that respondent might prove facts showing that petitioner was personally involved in the events that resulted in the failure to communicate said warrant to the police. The affidavits filed in support of petitioner's summary judgment motion did not disclaim such personal involvement. *See Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 158-59 (1970).

required by the court or other higher authority for transmittal of such orders,[4] or upon his failure to devise procedures that were suitable for assuring transmittal of the orders.

Petitioner's own immunity argument, moreover, demonstrates the lack of a sufficient factual basis for his asserted need for absolute immunity. On the one hand, petitioner maintains that his immunity is founded upon the protection from suit historically accorded clerks who perform purely ministerial acts ordered by the court, Pet. Br. 20-22, while on the other hand, he makes the inconsistent argument that immunity is needed to promote his exercise of discretion in devising procedures that are best suited for the notification of warrant recall orders. *Id.* at 30. As noted more fully below, pp. 24-27, the nature and scope of the discretion required in the performance of an official's duty is critical to the determination of what degree of immunity, if any, should be accorded. *Scheuer v. Rhodes,* 416 U.S. 232, 246-47 (1974). *See McCray v. Maryland,* 456 F.2d 1, 3-4 (4th Cir. 1972); *Raitport v. Provident National Bank,* 451 F. Supp. 522, 536 (E.D. Pa. 1978). Here it is impossible to determine where on the ministerial-discretionary continuum of conduct petitioner's alleged unconstitutional actions lie since petitioner has not offered even a hypothesis, much less any evidence, as to who is "at fault for failing to establish or execute appropriate procedures for preventing such serious

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[4]Petitioner points out that the procedures required for the recall of arrest warrants were established both by a general administrative order of the court and by a joint committee of officials from various governmental agencies. Pet. Br. 15. Whether petitioner failed to implement these required procedures and thereby prevented the order recalling respondent's arrest warrant from being transmitted to the police is yet to be determined.

malfunctionings in the administration of justice."[5] *Murray v. City of Chicago*, 634 F.2d 365, 366 (7th Cir. 1980) (Pet. Cert. at 3a-4a).

Although there is thus doubt as to the nature of petitioner's responsibility for respondent's constitutional deprivation, there is no doubt that his actions were administrative or ministerial in character. Since petitioner has proferred no reason why he should be excepted from this Court's consistent holdings denying absolute immunity to other officials who also perform important administrative or ministerial functions, petitioner has failed to meet his burden of establishing his entitlement to absolute immunity. This case need not be decided, however, merely on the ground of petitioner's failure to meet his burden, for an examination of congressional intent and the policies underlying both § 1983 and the immunity doctrine will show not only that a general

[5]Questions unanswered by petitioner that are critical to the determination of his responsibility for respondent's constitutional deprivation include the following: Was there any system for confirming the receipt of arrest warrant recall orders by the police? What reporting system, if any, did petitioner have for determining whether people were being arrested on the basis of recalled warrants? How were recall orders sorted for delivery and actually delivered to the police? If, for example, petitioner had not instituted a system for checking on the receipt of recall orders by the police, despite his knowledge that people were frequently arrested on the basis of warrants recalled months earlier, petitioner's responsibility for respondent's unconstitutional arrest would be established. If the absence of such a system were due to petitioner's failure to implement established procedures required by the joint committee, see *supra* p. 7 at note 3, petitioner's actionable conduct would appropriately be deemed ministerial and therefore entitled to no immunity. *See infra* pp. 24-28. If, however, the absence of such a system were due to petitioner's failure to devise appropriate checking methods in response to the manifest need for additional safeguards, petitioner's actionable conduct may be deemed discretionary, in which case he might be entitled to assert a qualified immunity. ***But see infra*** p. 29 at note 15.

rule of absolute immunity is wholly unwarranted for court clerks, but that qualified immunity is also inappropriate where court clerks violate their ministerial duties.

II.

THE CONGRESSIONAL INTENT IN ENACTING §1983 AS CONSTRUED IN LIGHT OF THE COMMON LAW IN 1871 FORECLOSES PETITIONER'S CLAIM TO ANY IMMUNITY.

A. Petitioner Can Demonstrate His Entitlement To An Immunity Of Any Kind Only By Showing That Such Immunity Both Had A Common Law Equivalent In 1871 And Is Consistent With Congress' Purposes In Enacting §1983.

The question of whether an official is entitled to immunity from damages under §1983 is "essentially one of statutory construction." *Owen v. City of Independence,* 445 U.S. 622, 635 (1980). Since neither §1983's general language nor the congressional debates[6] spell out the limits of §1983,

[6]However, as this Court noted in *Owen v. City of Independence,* 445 U.S. 622, 635-36 (1980), the Congressional debates do "confirm the expansive sweep of the statutory language." The grant of an immunity that is not strictly required by a clear showing of congressional intent could be reconciled neither with Representative Shellabarger's remarks quoted in *Owen* that the Act is to be construed with "the largest latitude consistent with the words employed," 445 U.S. at 636, nor with this Court's recent finding that "[a]s remedial legislation, §1983 is to be construed generously to further its primary purpose." *Gomez v. Toledo,* 446 U.S. 635, 639 (1980). A grant of immunity to court clerks would,

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Tenney v. Brandhove, 341 U.S. 367, 376 (1951), the Court has inferred Congress' intent on the question of official immunity from both the common law background in 1871 and Congress' purposes in enacting the statute. *Gomez v. Toledo*, 446 U.S. 635, 639 (1980).

In order to justify the grant of immunity under § 1983 this Court has required that two conditions be met: the common law equivalent to the immunity must have been well-established when § 1983 was enacted, *Owen v. City of Independence*, 445 U.S. at 637, and the policies served by the common law immunity must be compatible with the 1871 Congress' purpose of exposing state and local officials to a new form of liability. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. _____, _____, 101 S. Ct. 2748, 2755 (1981). Petitioner agrees that his immunity must be determined by reference to the immunity that was accorded court clerks at common law prior to 1871. Pet. Br. 16-17. Petitioner, however, utterly confuses the common law rules of official liability in the nineteenth century, turning upside down the clear holdings of courts that invariably refused to accord any immunity to court clerks sued for their failure to perform their ministerial duties.

(footnote continued from preceding page)

moreover, be particularly difficult to reconcile with the concern expressed by many supporters of the bill that state court officials were a primary source of the violations of citizen's rights. *See* Cong. Globe, 42d Cong., 1st Sess. 394 (1871) (remarks of Rep. Rainey); *id.* at 653 (remarks of Sen. Osborn); *id.*, App. at 185-86 (remarks of Rep. Platt). As this Court recognized in *Mitchum v. Foster*, 407 U.S. 225, 240 (1972), one of the major purposes of the Act was to provide a federal remedy for the violations of freedmen's and their sympathizers' constitutional rights by state court officials.

B. Under The Unanimously Held Common Law Rule In 1871 Court Clerks Were Liable In Damages For Their Failure To Perform Ministerial Duties.

In 1870 this Court recognized that officials had no immunity whatever for their violation of ministerial duties:

> [T]he rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender.

Amy v. The Supervisors, 78 U.S. 136, 138 (1870). *See also* 2 C. Addison, *A Treatise on the Law of Torts* 111 (1881); T. Cooley, *A Treatise on the Law of Torts* 379-83 (1880); 2 T. Sedgwick, *A Treatise on the Measure of Damages* 443-45 (7th ed. 1880). Clerks of courts were not excepted from this rule of liability, which was succintly summarized in 11 C.J. *Clerks of Courts* §86 (1917):

> Where a clerk of court fails or refuses to perform, or is negligent in the performance of, a duty imposed on him by law. . .and, if his act was the direct and proximate cause of the resultant injury, without contributory negligence on the part of the party complaining, the clerk is liable in damages therefor both personally and on his official bond.

(Footnotes omitted.) Eighty-one cases are cited in support of this statement of the general rule. *See id.* at 892 n.97.[7]

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[7]The rule that clerks of courts were liable for negligently performing ministerial acts originated in England as early as 1583. *See French v. Couch,* 21 Eng. Rep. 100 (Ch. 1583) (clerk of court liable in damages for serving the wrong subpoena); *Douglass v. Yallop,* 97 Eng. Rep. 532

(continued)

Petitioner's alleged unconstitutional acts fall clearly within the common law rule of official liability for the nonperformance or improper performance of ministerial duties. The Illinois Supreme Court has defined a court clerk's duty to be ministerial "when it is absolute, certain and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *People v. May*, 251 Ill. 54, 57, 95 N.E. 999, 1000 (1911). *Accord, Grider v. Talley*, 77 Ala. 422, 425 (1884); *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 173-74 (1861); *Morton, Bliss & Co. v. Comptroller General*, 4 S.C. 430, 474-74 (1873). The acts of court clerks were generally recognized in the nineteenth century as being of this ministerial character. *See, e.g., Marsh v. Fulton County*, 77 U.S. 676, 682 (1870); *Hughes v. Streeter*, 24 Ill. 647 (1860); *McNutt v. Livingston*, 15 Miss. (7 S. & M.) 641 (1846); *Brock v. Hopkins*, 5 Neb. 231, 235-36 (1876). *See generally* T. Cooley, *A Treatise On The Law Of Torts* 392 (1880).

If factual clarification reveals that petitioner should be deemed responsibile for the actual failure to notify the police of the recall of respondent's arrest warrant, *see supra* p. 7, n. 3, under nineteenth century common law rules he would unquestionably be liable for the failure to perform his ministerial duty. The duty to transmit the judge's recall order is absolute, certain, and imperative, involving merely the execution of the judge's directive. *Cf. People v. May*, 251 Ill.

(footnote continued from preceding page)

(K.B. 1759) (clerk of court liable for failing to enter a judgment on the roll). *See also Wildes v. Morris*, [1853] 22 L.J.M.C. (n.s.) 4 (1852); *Robinson v. Gell*, 138 Eng. Rep. 857 (C.P. 1852); *Whitelegg v. Richards*, 107 Eng. Rep. 300 (K.B. 1823). American courts continued to follow the common law rule after independence, *See, e.g., Russell v. Clayton*, 7 Va. (3 Call) 42 (1801).

54, 57, 95 N.E. 999, 1000 (1911) (clerk's determination of resident status of surety is ministerial).

Similarly, if petitioner's responsibility is found to have resulted from his failure to implement specific arrest warrant recall procedures established by order of the court, he would also have been liable at common law on the basis of his nonperformance of a ministerial duty. Since petitioner had no discretion allowing him to decide not to implement such procedures, Pet. Br. 15, his duty would require only the execution of the judge's directive and therefore would be classified as purely ministerial. *People v. May,* 251 Ill. at 57, 95 N.E. at 1000.

The common law would have conferred no immunity on petitioner, moreover, even if he had exercised wide discretion in implementing or formulating the procedures for notifying the police of arrest warrant recall orders. Where an official was legally required to accomplish a clear and definite duty, his necessary exercise of discretion in determining and implementing the methods for achieving the mandated objective did not relieve him from liability for failing to fulfill that duty. Thus, in *Hicks v. Dorn,* 42 N.Y. 47 (1870), the court rejected the contention of the defendant Superintendent of Canal Repairs that he should be immune from having to answer in damages for his destruction of plaintiff's boat because he was required to exercise a judicial-type discretion in deciding how best to fulfill his duty of ensuring continued canal navigation:

> The law made it [defendant's] duty to put his canal in repair. . .and it was not left to his discretion to determine whether he would discharge that duty or not. . . . It is true that [defendant] was bound to exercise his discretion as to the methods and instrumentalities to be employed. . . yet it has never been held that, merely because ministerial officers have a discretion to exercise, that gives them the immunity of judicial officers.

Id. at 52-53.

Court officials acting pursuant to court order were not excepted from this general rule of liability for officers whose exercise of discretion resulted in the failure to accomplish ministerial duties. In *Buck v. Colbath,* 70 U.S. (3 Wall.) 334 (1865), this Court pointed out, in determining the liability of a court officer who executes a writ directing him to levy upon unspecified property, that such "officer has a very large and important field for the exercise of his judgment and discretion. . .and is legally responsible to any person for the consequences of any error or mistake in its exercise to his prejudice." *Id.* at 344.

In explaining the reason for the liability of an official such as the one described in *Buck v. Colbath,* the court in *McCord v. High,* 24 Iowa 336 (1868), pointed out that the official's liability depends not on whether he must exercise discretion in determining how to accomplish the court's order, but rather, on the absence of any discretion in deciding whether to accomplish that order:

> In the performance of these [acts unspecified by the law or the writ], he exercises discretion and judgment, and is liable for errors and mistakes that may result in loss to others, though they were the result of the deliberate exercise, in good faith, of such discretion and judgment. In short, he has no discretion, and can exercise no judgment, in regard to the end to be attained by his discharge of duty; as to the means and manner of accomplishing the end, he, of necessity, must be more or less free to choose, for it is impossible for the law to provide rules adapted to the infinite variety of human actions and attendant circumstances that may be met by its ministers.

Id. at 344.

The type of discretion exercised by the officials in *Buck* and *McCord* is indistinguishable in nature from even the

broadest discretion putatively exercised by petitioner in devising or implementing the court-ordered procedures for the transmittal of arrest warrant recall orders to the police. Under the common law in 1871, as exemplified in these cases, petitioner's exercise of discretion in determining the best means and manner of accomplishing the transmittal of a warrant recall order would have entitled him to no immunity of any kind.

As *Owen v. City of Independence*, 445 U.S. 622 (1980), has made clear, this nineteenth century rule denying any immunity to officials whose exercise of discretion results in their failure to fulfill ministerial duties directly bears upon the present determination of immunity under § 1983. This Court found in *Owen* that the general nineteenth century common law immunity for municipalities' conduct of governmental functions did not warrant granting *any* immunity to municipalities under § 1983 because, *inter alia*:

> [w]hile the city retained its immunity for decisions as to whether the public interest required acting in one manner or another, once any particular decision was made, the city was fully liable for any injuries incurred in the execution of its judgment.

Owen v. City of Independence, 445 U.S. 622, 649 (1980). *See also id.* at 679-80 n.19 (Powell, J. dissenting). Thus, if, as *Owen* found, municipalities have no valid claim to immunity in § 1983 actions because the common law in the nineteenth century denied them any immunity for their exercise of discretion in executing policy, ministerial officials must also be denied immunity in § 1983 actions. The common law gave them no more immunity for their exercise of discretion in executing ministerial duties than it gave municipalities for their exercise of discretion in executing governmental policies.

Under these common law principles, petitioner would be immune here only if he had discretion to decide *ab initio* whether to carry out the presiding judge's general order requiring warrant recall orders to be transmitted to the police. Under petitioner's own submission, however, not only was it his duty to implement such order, but the methods and procedures for carrying out that order had been devised by a joint committee of local governmental officials, which included a representative of his office. Pet. Br. 15. Therefore, regardless of the degree of discretion petitioner may have exercised in determining the manner in which warrant recall procedures should be implemented, under uniformly held nineteenth century common law principles his exercise of that discretion would not confer him with any immunity from damages for his improper failure to assure that such procedures were adequate to accomplish the actual transmittal of warrant recall orders to the police.[8]

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[8]Petitioner does not contend that he would have been immune under nineteenth century common law rules because of the arguably discretionary nature of his conduct. It may be noted nevertheless that the nineteenth century Supreme Court cases that did find executive officials immune because of the discretionary nature of their decision-making did so because the statutes under which these officials were authorized to act explicitly or impliedly committed such decision-making to their discretion, thereby affording them the defense of legal justification. *See, e.g., Otis v. Walter,* 15 U.S. 7, 8, 2 Wheat 18, 21 (1817); *Martin v. Mott,* 25 U.S. 10, 13-14, 12 Wheat. 19, 31-32 (1827), *Kendall v. Stokes,* 44 U.S. 296, 3 How. 87 (1844). An officer who did not exercise his discretion in good faith, however, could not take advantage of this defense. *Wilkes v. Dinsman,* 48 U.S. 55, 65, 7 How. 89, 130-31 (1849) ("[T]he officer, being intrusted with a discretion for public purposes, is not to be punished for the exercise of it, unless it is first proved against him, either that he exercised the power confided in cases without his jurisdiction, or in a manner not confided to him, as with malice, cruelty, or wilful oppression. . . .").

C. Petitioner's Claim That Court Clerks Under Nineteenth Century Common Law Principles Had Absolute Immunity From Damages Has No Support In The Case Law.

All of petitioner's arguments for absolute immunity under nineteenth century common law rules are in utter contradiction to those rules. First, petitioner maintains that in performing acts pursuant to court order the clerk would have judicial immunity in the same fashion as would the judge. Pet. Br. 22. This argument, however, has no application here since respondent has alleged that petitioner acted contrary to court orders both to recall the warrant for respondent's arrest and to implement adequate procedures to assure that such recall orders are transmitted to the police. Court officials who failed in a similar fashion to carry out judicial orders had no immunity under nineteenth century common law rules. *Governor v. Dodd,* 81 Ill. 162 (1976); *State v. Bowen,* 41 Mo. 217 (1867); *State v. Merritt,* 65 N.C. 558 (1871); *The Judges v. Deans,* 9 N.C. 93 (1822).

Petitioner argues nevertheless that a clerk was not liable for the negligent failure to carry out a court order "because the clerk's act was considered the act of the judge who was not amenable to suit at common law." Pet. Br. 10. It is illogical, however, to maintain that a clerk's act should be considered the judge's act when the clerk's only "act" is to violate the judge's mandatory order to perform a certain ministerial duty. Moreover, petitioner is simply incorrect in asserting that judges were not subject to liability in damages for improper performance of a ministerial act. Pet. Br. 10, 22. Thus, in *Ex Parte Virginia,* 100 U.S. 339 (1879), this Court upheld the liability of a state court judge who had excluded Blacks from serving as jurors, noting:

> "Whether the act done by [the defendant judge] was judicial or not is to be determined by its character, and

> not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge.

Id. at 348. *See also Peters v. Land,* 5 Blackf. 12 (Ind. 1838); *Mayberry v. Kelley,* 1 Kans. 116 (1862); *Briggs v. Wardwell,* 10 Mass. 356 (1813); *Tompkins v. Sands,* 8 Wend. 462 (N.Y. Sup. Ct. 1832); *Place v. Taylor,* 22 Ohio St. 317 (1872); *Ferguson v. Earl of Kinnoull,* 8 Eng. Rep. 412 (H.L. 1842); *Daubney v. Cooper,* 109 Eng. Rep. 438 (K.B. 1829). *See generally* T. Weeks, *The Doctrine of Damne Absque Injuria,* 207-11, 219 (1879). Finally, even if petitioner were correct that on the facts of this case it would be possible for him to establish that he was actually carrying out a court order, this assertion would not have established an absolute immunity from suit, but instead would merely have constituted the ground for a defense at common law. *Davidson v. Wiley, Banks & Co.,* 31 Ala. 452 (1858). *See generally* A. Stearns, *The Law of Suretyship* 335-37 (1903).

Petitioner's alternative argument that clerks were not liable at common law for negligent conduct, Pet. Br. 21, is simply contrary to the overwhelming majority of nineteenth century cases, which held that court clerks are liable for negligently performing or failing to perform ministerial duties imposed by statute, common law, or order of court.[9]

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[9] *Collins v. McDaniel & Strong,* 66 Ga. 203 (1880); *Governor v. Dodd,* 81 Ill. 162 (1876); *Hughes v. Streeter,* 24 Ill. 647 (1860); *Governor v. Ridgway,* 12 Ill. 14 (1850); *State v. Ritter,* 20 Ind. 406 (1863); *Haverly & McDonald v. McClelland,* 57 Iowa 182 (1881); *McFarland v. Burton,* 89 Ky. 294, 12 S.W. 336 (1889); *Bank of Kentucky v. Haggin,* 8 Ky. 225, 1 A.K. Marsh. 306 (1818); *Anderson v. Joiiett,* 14 La. Ann. 614 (1859); *Maxwell v. Pike,* 2 Me. 8 (1822); *(continued)*

Petitioner cites *Commonwealth v. Thompson,* 65 Ky. (2 Bush) 559 (1866 for the proposition that "[t]he clerk's negligence. . .was no exception to the clerk's immunity from liabiliy." Pet. Br. 21. This case actually held that where the clerk's action was subsequently approved by the court, his culpability must be greater than mere negligence for there to be a cause of action. 65 Ky. at 560. At most, *Thompson* establishes a qualified immunity for clerks of court who commit merely negligent acts that are later ratified by the judge. Most important, petitioner fails to note that *Thompson* is inconsistent with both preceding and subsequent Kentucky cases that held clerks of courts liable for their negligence. *Samuels v. Brand,* 119 Ky. 13, 82 S.W. 977 (1904); *McFarland v. Burton,* 89 Ky. 294, 12 S.W. 336 (1890); *Commonwealth v. Chambers,* 31 Ky. 8 (1 Dana 11) (1833); *Bank of Kentucky v. Haggin,* 8 Ky. 225, 1 A.K. Marsh. 306 (1818); *Marshall v. Byram,* 4 Ky. (1 Bibb) 341 (1809). *See also Kennedy v. Terrill,* 3 Ky. (1 Hard.) 498 (1808) (justice of the peace may be liable for issuing illegal warrant).

Petitioner also cites *Billings v. Lafferty,* 31 Ill. 318 (1863) to support his claim that a plaintiff must allege that the clerk acted wilfully and maliciously before an action would lie. Pet. Br. 19-20. This is a serious misreading of the holding of

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(footnote continued from preceding page)

Rosenthal v. Davenport, 38 Minn. 543, 38 N.W. 618 (1888); *Brown v. Lester,* 21 Miss (13 S. & M.) 392 (1850); *McNutt v. Livingston,* 15 Miss. (7 S. & M.) 641 (1846); *Brock v. Hopkins,* 5 Neb. 231 (1876); *State v. Merritt,* 65 N.C. 558 (1871); *State v. Gaines,* 30 N.C. 168 (1847); *State v. Watson,* 29 N.C. 226, 7 Ired. 289 (1847); *Coltraine v. McCain,* 14 N.C. (3 Dev.) 308 (1832); *Ziegler v. Commonwealth,* 12 Pa. 227 (1849); *Pass v. Dibrell,* 16 Tenn. (8 Yerg.) 470 (1835); *Clark v. Wilcox,* 31 Tex. 322 (1868); *Watts's Heirs v. Robson,* 6 Tex. 206 (1851); *Russell v. Clayton,* 7 Va. (3 Call) 41 (1801).

Billings in which the Illinois Supreme Court simply upheld a complaint that alleged a wrongful and unjust intention to injure the plaintiff. The court was silent on the question of whether a plea of negligence would have been sufficient to uphold the cause of action. That the court would have found such a plea sufficient seems most likely in light of its holding thirteen years later that a clerk of the court was liable for negligently failing to enter a judgment. *Governor v. Dodd,* 81 Ill. 162 (1876).

Finally, petitioner argues that the nineteenth century cases finding clerks liable for the failure to perform ministerial acts are explained by statutes requiring court clerks to have surety bonds, rather than by common law principles of official liability. Pet. Br. 19-20. Contrary to petitioner's contention that "[s]tate courts which found the court clerk liable at common law for failure to perform an act considered ministerial did so because the act was mandated by the bond statute. . .," Pet. Br. 20, an official was not liable on his bond unless he violated one of "the duties of his office" otherwise specified by the law. *See, e.g.,* Ill. Rev. Stat. 1979, ch. 25 §4 (1979), Pet. Br. 19, *Governor v. Ridgway,* 12 Ill. 14, 17 (1850) (". . .it is clear that he [the clerk] is not responsible upon his official bond for failing to do what the law did not require.").

Just as bond statutes created no legal duties *ex proprio vigore,* they also did not limit the legal duties that could be the subject of redress at common law. As the court noted in *Pass v. Dibrell,* 16 Tenn. (8 Yerg.) 470, 473 (1835), an action against the clerk's bond was held not to "supercede, or impair the force of the common law remedy by an action on the case." This Court has also recognized that the existence of a bond statute did not abrogate the common law right of action in assumpsit against a treasurer. *Walton v. United*

States, 22 U.S. (9 Wheat) 651 (1824). *Accord, Cole County v. Dallmeyer,* 101 Mo. 57, 13 S.W. 687 (1890). Even *Crocker v. Fales,* 13 Mass. 259 (1816), relied upon by petitioner, Pet. Br. 20, found that where the bond did not cover acts for which a clerk could be liable, the proper remedy was against the clerk personally.

In sum, if the facts of this case had been presented to a court in 1871, the petitioner would have been accorded no immunity whatever, much less the absolute one he claims. The result would have been the same even if petitioner had been able to show that he exercised wide discretion in implementing or devising procedures for the transmittal of arrest warrant recall orders to the police. Since nineteenth century courts would have deemed his duty in this regard to be purely ministerial, petitioner's failure properly to perform that duty would have been sufficient to render him liable, even if such failure resulted merely from "[a] mistake as to his duty" and in spite of his "honest intentions." *Amy v. The Supervisors,* 78 U.S. 136, 138 (1870). Petitioner's claim of absolute immunity may therefore prevail only if this Court should decide this case without regard to the firmly established nineteenth century common law rules of official liability, which Congress is presumed to have recognized in enacting the predecessor of §1983.

This Court should not deviate, however, from its past insistence that questions of immunity under §1983 be determined through construction of congressional intent. Fundamental principles of the separation of powers require fidelity to congressional intent in determining the reach of a statute. *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 194 (1978). *See also United States v. Richardson,* 418 U.S. 166, 188 (1973) (Powell, J., concurring). Moreover, since Congress has specified particular standards of official

immunity for civil rights violations when it has deemed such specification appropriate[10], and is even now considering bills to specify such standards under §1983,[11] it would be particularly inappropriate to decide the immunity question here without regard to legislative intent. In this case, fidelity to that intent requires rejection of petitioner's claim to any immunity for his exercise of ministerial duties, for as shown above, in 1871 there was no common law equivalent to immunity for court clerks who failed to perform such duties and, as shown in Part III below, the rationale for such an immunity is inconsistent with the purposes underlying §1983.

III.

THE POLICY REASONS UNDERLYING THIS COURT'S IMMUNITY DECISIONS WEIGH HEAVILY AGAINST PETITIONER'S CLAIM OF IMMUNITY.

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[10]The Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351. tit. III, §802, 82 Stat. 223 (1968) was amended in 1970 to provide: "A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action action brought under this chapter or under any other law." 18 U.S.C. §2520 (1976).

[11]Pending before the Congress are S. 585, 97th Cong., 1st Sess. (1981), and H.R. 4616, 97th Cong., 1st Sess. (1981), which would amend §1983 to provide: "No civil action may be brought against a political subdivision of a state under this section if the political subdivision acted in good faith with a reasonable belief that the actions of the political subdivisions were not in violation of any rights, privileges, or immunities secured by the Constitution or by laws providing for equal rights of citizens or persons."

A. Petitioner Deserves No Immunity Whatever For His Improper Performance Of Ministerial Duties.

This Court has never determined in a §1983 case the applicability of the common law rule denying any immunity from damages to officials who cause injury through violating their ministerial duties.[12] The necessary application of such rule derives, however, not only from the aforesaid considerations of congressional intent, but also from this Court's recent immunity decisions, which demonstrate that the central purpose of immunity in §1983 cases is to protect officials' ability to exercise judgment and discretion. For example, in *Wood v. Strickland*, 420 U.S. 308 (1975), this Court found that "absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner...." *Id.* at 320. Protecting the exercise of discretion

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[12]Dissenting in *Procunier v. Navarette*, 434 U.S. 555 (1978), Justice Stevens noted that, although the scope of their duties was not clear, certain of the defendant prison officials, who were granted a qualified immunity, may have been performing ministerial chores. *Id.* at 569 n.3. This Court apparently based its opinion, however, upon the assumption that, since plaintiff-respondent had conceded the officials' entitlement to a qualified immunity, the question of that entitlement was not a contested issue in the case. *Id.* at 560-61. That the Court in *Procunier* did not intend to expand *sub silentio* the scope of the qualified immunity defense to include the performance of ministerial duties also seems apparent from its finding that such defense is supported by Courts of Appeals that "have generally accorded prison and jail administrators *performing discretionary functions* a qualified immunity from monetary liability under §1983." *Id.* at 561 n.7 (emphasis added). *See Downs v. Sawtelle*, 574 F.2d 1, 14n. 19 (1st Cir. 1978), *cert denied*, 439 U.S. 910 (1978) (*Procunier v. Navarette* deemed not inconsistent with possibility that on remand state social workers will be found not entitled to assert a qualified immunity in a §1983 action.).

was also the basis for the Court's award of a qualified immunity, which was deemed necessary because the function of school board members, like that of legislators and adjudicators, "necessarily involves the exercise of discretion, the weighing of many factors, and the formulating of long-term policy." *Id.* at 319 (footnote omitted). *See also Butz v. Economou,* 438 U.S. 478, 507 (1978); *Scheuer v. Rhodes,* 416 U.S. 232, 247, 250 (1974). Without an absolute or qualified immunity for officials who exercise substantial judgment or discretion on matter of public interest, this Court has concluded, there would be too great a danger that such officials would skew their decisions towards minimizing their risk of personal liability rather than towards advancing the public interest. *Owen v. City of Independence,* 445 U.S. 622, 655-56 (1980); *Imbler v. Pachtman,* 424 U.S. 409, 423-25 (1976).

Where, as here, an official has no choice as to the proper course of action demanded by the public interest because his duty is ministerial, the fear of suit would only enhance his motivation to comply with his designated duty since such compliance would serve to protect him from liability for violating constitutional rights.[13] Thus, whereas the compensatory and deterrent purposes of §1983 must be mediated by a greater or lesser degree of immunity in

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[13]An official sued for violating constitutional rights in the course of properly discharging his ministerial duties could assert a derivative immunity where he acted pursuant to the valid orders of immune superiors, and possibly could assert a qualified immunity where his reliance on an invalid ministerial order or statutory mandate was reasonable. *See* Sowle, *Qualified Immunity In Section 1983 Cases: The Unresolved Issues of the Conditions for Its Use and the Burden of Persuasion,* 55 Tulane L. Rev. 326, 365-383 (1981). *See also Williams v. Wood,* 612 F.2d 982, 985 (5th Cir. 1980).

situations where the public interest demands substantial freedom of action by officials, no such interest is served by immunizing officials who improperly execute ministerial duties. Rather, the public's interest in assuring its officials' faithful execution of clear legal mandates is consistent with the compensatory and deterrent purposes of §1983. *See Dalton v. Hysell,* 381 N.E.2d 955, 956 (Ohio App. 1978) ("In this case. . .the fact that the Clerk of Courts is subject to possible civil liability tends to encourage proper performance of a statutorily prescribed ministerial duty rather than discouraging same; hence, a public policy argument does not support immunity.") *See* Sowle, *supra* note 13 at 383-93.

The factual record in this case does not support petitioner's claim that the public's need to promote his free exercise of discretion requires that he be given any degree of immunity from §1983 damages. As noted above, pp. 7-8, petitioner's liability may ultimately be predicated upon his deputies' failure to transmit the judge's warrant recall order to the police or upon his own failure to implement properly the established procedures required for the transmittal of such orders. With respect to either failure petitioner may not claim the protection that absolute or qualified immunity affords to officials exercising substantial discretion since such actions are far on the ministerial side of the spectrum of official action. The objective of transmitting arrest warrant recall orders to the police is simple and clear; since the procedues for accomplishing this have already been established, petitioner had no significant choice as to what his proper course of action must be in order to reach that objective. *See, e.g., Johnston v. District of Columbia,* 118 U.S. 19, 20-21 (1886). *See also Johnson v. State,* 69 Cal. 2d 782, 794, 447 P.2d 352, 360 (1968) (rationale for immunity

applies at the "planning," but not the "operational" level of decision-making). Giving petitioner any degree of immunity from suit for constitutional deprivations caused by his improper performance of these ministerial duties would only retard the public's interest in assuring that judges' orders recalling arrest warrants are transmitted to the police.

Petitioner implies that withholding immunity would be unfair as well as administratively inefficient. Pet. Br. 31. Fairness, however, does not lie in making the innocent victim bear the loss of an injury inflicted by one whose actions are not only heedless, but are also unlawful. "Elemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen v. City of Independence,* 445 U.S. 622, 654 (1980). Furthermore, according to fundamental premises of the common law, sanctions for the infliction of injuries whether by accident or design will tend to decrease the occurrence of such injuries. *See Carlson v. Green,* 446 U.S. 14, 21 (1980) ("It is almost axiomatic that the threat of damages has a deterrent effect"). Indeed, petitioner apparently shared this notion when he advised his clerks that failure to follow the correct procedure for processing motions to recall warrants may expose them to liability for civil rights violations under § 1983. J.A. at 20.

It has, however, been observed that "[a] public servant who is conscientiously doing his job to the best of his ability should rarely, if ever, be exposed to the risk of damage liability." *Procunier v. Navarette,* 434 U.S. 555, 569 (1978) (Stevens, J. dissenting). Were it clear that ministerial officials who "carelessly disregarded the standards which their superiors directed them to follow. . .would be unable to make the threshold showing necessary to establish good faith," *id.* at 572, the availability of a qualified immunity for ministerial officials who improperly perform their duties

would make little difference since the violation of their ministerial duty would always be a violation of their immunity. However, a good faith immunity might also protect officials who negligently violate constitutional norms whenever those norms are not clearly established. *See Procunier v. Navarette*, 434 U.S. 555, 562-63 (1978). A good faith immunity under such circumstances is justified with respect to officials who must exercise considerable judgment or discretion since society requires that they not feel compelled to decide what is in the public interest by "predicting the future course of constitutional law."[14] *Wood v. Strickland*, 420 U.S. 308, 322 (1975), quoting *Pierson v. Ray*, 386 U.S. 547, 557 (1967). With respect to officials performing ministerial duties, however, a qualified immunity is inappropriate since the public's interest is in encouraging their performance of those duties, not in encouraging their exercise of discretion in determining what the public interest is.

B. No Policy Reasons Justify Granting Petitioner An Absolute Immunity For Any Of His Alleged Unconstitutional Actions.

1. Absolute Immunity Is Not Required For The Adequate Performance Of Court Clerks' Duties.

Even if petitioner could eventually demonstrate that his substantial exercise of discretion in devising a transmittal system for warrant recall orders requires a qualified

[14]But see Sowle, supra note 13 at 344-48 ("Because 'the question of whether the officer acted reasonably is actually one of whether he was negligent,' this privilege [qualified good faith immunity] is inapplicable in a negligence action. The reasonableness prong of the privilege is subsumed in the negligence action. . . .") (Footnote omitted).

immunity from damages, he could not substantiate his claim to an absolute immunity.[15] A court administrator who formulates a procedural system for his subordinates to follow cannot reasonably claim a need for an immunity that is greater than that required by a governor who must act swiftly and firmly to restore order in a state of civil disorder. *Scheuer v. Rhodes,* 416 U.S. 232, 246 (1974). To give the Clerk's procedural formulations " 'the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreveiwable through the judicial power of the Federal Government,' " *Scheuer v. Rhodes,* 416 U.S. at 248 (quoting *Sterling v. Constantin,* 287 U.S. 378, 397 (1932)), would not only drain §1983 of meaning, *id.*, but would elevate clerks of courts to a status in the law unique among governmental administrators.

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[15]The record, however, is insufficient to support a finding that petitioner is entitled to assert a qualified immunity defense. Not only may petitioner's duties have been ministerial in nature, but he also may not have exercised the discretion that his duties might have authorized. Since the purpose of qualified immunity is to protect officials' freedom to exercise discretion in the public interest, *see supra* at pp. 24-25, an official who fails to exercise such discretion should not be entitled to immunity even if he can show that he reasonably did not know his actions would violate clearly established constitutional rights. *See Johnson v. State,* 69 Cal.2d 782, 794-95 n.8, 447 P.2d 352, 361 n.8 (1968) (official who normally engages in discretionary activity is not entitled to immunity unless he demonstrates that "a policy decision, consciously balancing risks and advantages took place."). Just as Congress in excepting discretionary functions from liability under the Federal Tort Claims Act, 28 U.S.C. §2680(a) and the Administrative Procedure Act, 5 U.S.C. §701(a)(2) has not automatically immunized all actions of officials whose duties involve the exercise of discretion, so Congress in providing a strong deterrent and compensatory remedy under §1983 should not be deemed to have provided an automatic immunity defense for all officials whose duties similarly involve the exercise of discretion.

Petitioner, however, argues for such a status on the paradoxical grounds that absolute immunity is necessary, on the one hand, because it "will shield petitioner when he aids the judge he serves by devising procedures best suited, in the petitioner's judgment, to implement judicial orders. . . ," Pet. Br. 31, and on the other hand, because his "notification of warrant recall orders was clearly performance of a quasi-judicial function required by court order. . . ." *Id.* at 30. If petitioner wishes to claim the absolute immunity a clerk derives from his faithful execution of a valid court order, he cannot also claim that he deserves such immunity because he acts as an administrator who exercises independent judgment. Significantly, petitioner on the facts of this case is unable to rely on either argument as an independent ground for absolute immunity. On the one hand, the failure to execute the court's warrant recall order deprives him of the absolute immunity that a ministerial official derives only from acting *pursuant to* judicial order. On the other hand, petitioner's formulation of procedures for transmitting the recall orders justifies at most the qualified immunity that is afforded administrators who exercise judgment or discretion.

The only escape from this paradox would be if this Court were to hold that absolute immunity protects all court functionaries, regardless of the nature of their functions or the consistency of their actions with court mandates. However, as noted above, *supra* p. 5, the actions of congressional functionaries that are necessary to the conduct of congressional business do not warrant absolute immunity, even in the face of the separation of powers doctrine and the Speech or Debate Clause of the Constitution. For the same reasons, giving blanket immunity to court

functionaries cannot be justified simply because their duties when properly carried out are important to the conduct of court business.

Petitioner's argument that clerks require absolute immunity because their function is essential to the judicial process is also a non sequitur because the undeniable necessity of their function has no bearing on whether absolute immunity is needed for that function's adequate performance. *See McCray v. Maryland,* 456 F.2d 1, 3 (4th Cir. 1972). Indeed, if the fact that clerks are essential to courts has any relevance in this case, it is to emphasize the importance of maintaining the deterrent effect of the § 1983 damage remedy in order to reduce the danger that a clerk's inattentive or wilful exercise of his critical powers will paralyze the entire judicial process.

Even if it were posited that the possibility of a § 1983 suit would have some negative influence on clerks' performance of their duties, this Court's observation as to the nature of such influence on federal prison officials is equally true with respect to court clerks: "even if requiring them to defend respondent's suit might inhibit their efforts to perform their official duties, the qualified immunity accorded them. . . [cite]. . .provides adequate protection." *Carlson v. Green,* 446 U.S. 14, 19 (1980). Petitioner has presented no evidence whatever to meet his burden of establishing that a qualified immunity would not also adequately protect his ability, or the ability of court clerks in general, to exercise whatever discretion may be needed to perform their official duties in the public interest.

In denying absolute immunity to a federally appointed defense counsel sued in a state malpractice action, this Court noted that empirical data was necessary to support the defender's "not implausible" argument for his practical need

for such immunity. Without such evidence the Court was "unwilling to ascribe to Congress an intent to accord an immunity. . .in the face of the silent legislative history on this point." *Ferri v. Ackerman,* 444 U.S. 193, 200-01 n.17 (1979). As in *Ferri,* petitioner's practical argument for absolute immunity is without evidentiary support, but, unlike in *Ferri,* the argument here is implausible as well.

Petitioner's sole contention in this regard is that without absolute immunity from suit court clerks "will have no incentive to make decisions or suggestions to judges to promote the efficient administration of the judicial system." Pet. Br. 30. Petitioner acknowledges, however, that it is the duty of court clerks to promote the proper performance of judicial duties. Pet. Br. 9, 14. The fear of liability under §1983 would override court clerks' normal incentive to perform such duties only if that fear would cause them to act in ways contrary to "the efficient administration of the judicial system." As exemplified here, however, efficient judicial administration and the protection of constitutional rights are normally consistent objectives. The potential for liability under §1983 could therefore be expected only to reinforce a clerk's duty to promote efficient judicial administration. Even if the petitioner could hypothesize an actual conflict between the fear of §1983 liability and court clerks' incentive to fulfill that duty, such fulfillment would not require the elimination of any possibility of suit under §1983.

To the extent that petitioner argues, however, that absolute immunity is necessary to enable court clerks to go beyond their legal duties to improve the judicial system, his argument lacks not only empirical support and inherent plausibility, but also relevance to the issues here. There is no dispute in this case that petitioner had a legal duty to

implement procedures to assure that arrest warrant recall orders are delivered to the police. Pet. Br. 15. Moreover, it would be extraordinary if petitioner or any court clerk felt constrained by the fear of liability from offering "suggestions to judges to promote the efficient administration of the judicial system." Pet. Br. 30. Such "suggestions" would normally not be sufficient to cause constitutional violations, and even where they might be sufficient, clerks would not be liable unless they knew or should have known that their suggestions would result in the violation of clearly established constitutional rights.

Petitioner also argues, although without support in the record, that absolute immunity is necessary because of the likelihood that errors will occur in courts with over-crowded criminal dockets. Pet. Br. 11, 30. However, as this Court noted in *Butz v. Economou*, 438 U.S. 47, 516 n.40 (1978), the fact that officials "act under 'serious constraints of time and even information' " is not central to the determination of the need for absolute immunity "for the same might be said of a wide variety of state and federal officials who enjoy only qualified immunity." Moreover, because petitioner's challenged conduct in this case may also have an effect on the "thousands of other warrant recall orders issued by the Circuit Court and implemented by the petitioner's deputies," Pet. Br. 15, absolute immunity from damages is particularly inappropriate. Section 1983 has an especially beneficial role in encouraging constitutional behavior by officials whose enormous bureaucratic powers affect multitudes of people. *See Owen v. City of Independence*, 445 U.S. 622, 648 (1980); *Grimm v. Arizona Board of Pardons and Paroles*, 115 Ariz. 260, 266, 564 P.2d 1227, 1233 (1977) ("In this day of increasing power wielded by governmental officials, absolute immunity for nonjudicial, nonlegislative officials is outmoded and even dangerous").

2. The Duties Of Court Clerks Are Not Functionally Comparable To Those Of Judges In Deciding Cases.

The grant of absolute immunity has also been justified for actors in the judicial or adjudicatory process other than judges because of the "functional comparability of their judgments to those of the judge...." *Butz v. Economou,* 438 U.S. 478, 512, *quoting Imbler v. Pachtman,* 424 U.S. 409, 423 n.20 (1976). Even if petitioner's actionable conduct is determined to be discretionary rather than ministerial in nature, it cannot seriously be contended, and significantly, petitioner does not contend, that his administrative judgments are functionally comparable to the adjudicative judgments of judges.[16]

Court clerks' ministerial and administrative activities also do not share three special characteristics of judicial and judicial-type processes that have heretofore justified the grant of absolute immunity. First, court clerks' actions do not normally entail a risk that losing parties will seek relitigation of the merits of their claim by charging the clerk in the first adjudication with unconstitutional animus. *See Butz v. Economou,* 438 U.S. 478, 512 (1978). A losing party would not be likely to sue a clerk to achieve this end since the clerk did not participate in, and therefore could not be held responsible for, rendering the unfavorable ruling. To the extent that a losing litigant were to attempt to

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[16]*See Dalehite v. United States,* 346 U.S. 15, 34 (1953) (distinguishing between the discretion of a judge, which is "a power to decide within the limits of positive rules of law subject to judicial review," and the discretion of an executive or administrator, which is "to act according to one's judgment of the best course"). *See also Sellars v. Procunier,* 641 F.2d 1295, 1300-01 (9th Cir. 1981).

circumvent the judge's absolute immunity by suing the clerk for his enforcement of the judge's ruling, the clerk would enjoy an absolute derivative immunity. *See Williams v. Wood,* 612 F.2d 982, 985 (1980). As explained below, the overwhelming majority of cases petitioner cites in support of absolute immunity are those in which the clerk had such a derivative immunity for carrying out mandatory judicial orders. *Infra* pp. 39-50.

Second, while a judge who decides "controversial cases that arouse the most intense feeling in the litigants. . .should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption," *Pierson v. Ray,* 386 U.S. 547, 554 (1967), *Imbler v. Pachtman,* 424 U.S. 409, 435 (1978), a court clerk is normally not subject to such fears. Although any official who does not comply with a citizen's wishes may also engender intense feelings of hostility, there is no reason to believe that a court clerk, unlike a judge or prosecutor, would run any unusual risk in this regard, since the clerk neither decides to prosecute nor resolves the merits of a controversy against anyone. Moreover, since policemen, the officials in our society whose duties are most likely to generate citizen resentment, are sufficiently protected by a qualified immunity, *Pierson v. Ray,* 386 U.S. 547, 557 (1967), court clerks cannot require any greater protection.

Finally, absolute immunity has been justified for actors in judicial or judicial-type processes because of the presence of "safeguards built into the judicial process [that] tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct." *Butz v. Economou,* 438 U.S. 478, 512 (1978). Such safeguards have no analogue either in the process by which petitioner allegedly violated respondent's constitutional rights or in the pro-

cedures followed by clerks generally. Not one of the procedural safeguards found in *Butz v. Economou*, 438 U.S. at 513-14, to be essential to the absolute immunity of federal prosecutorial and fact-finding officials was available in this case in order to enable respondent to assure that the judge's order recalling her warrant was transmitted to the police.

The impossibility of providing procedural safeguards against a court clerk's negligent or wilful failure either to transmit arrest warrant recalls to the police or to create procedures to ensure their transmittal makes clear the utter inappropriateness of absolute immunity in the context of informal, non-adversarial official action. Without the possibility of either § 1983 damage actions or alternative safeguards to prevent constitutional deprivations, individuals have no recourse where particular officials are not timid about violating constitutional rights. *See Grimm v. Arizona Board of Pardons and Paroles*, 115 Ariz. 260, 260-66, 564 P.2d 1227, 1232-33 (1977). In recognition of this danger, this Court has never freed officials from the threat of damage actions where there is no assurance either in the nature of their tenure and responsibilities, *e.g.*, *Stump v. Sparkman*, 435 U.S. 349 (1978), or in the process by which they act, *e.g.*, *Pierson v. Ray*, 386 U.S. 547, 554 (1967), that individuals will have protection from their unconstitutional actions.[17]

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[17]The logic of petitioner's theory requires extension of absolute immunity to all court functionaries, including, for example, a bailiff who wilfully brutalizes a courtroom spectator under his general authority to keep order in the court, a court reporter who chooses not to prepare a transcript for appeal, a sheriff who serves a writ by leaving it in the sewer or a clerk who enters an order contrary to the judge's directions, thereby causing irreversible injury, such as the traumatic strip search here. J.A.

(continued)

3. No Alternative Remedies To A §1983 Damage Action Justify The Grant Of Absolute Immunity to Petitioner.

Petitioner argues that the possibility of criminal conviction of clerks and of actions on the clerk's $5,000.00 statutory bond raises "the fundamental question. . .as to the overall necessity for allowing a §1983 suit as a remedy." Pet. Br. 32. It is well settled, however, that a plaintiff may invoke §1983 even where officials' unconstitutional acts are in violation of and redressable under state law. *Monroe v. Pape,* 365 U.S. 167, 183 (1961).

Furthermore, petitioner does not show how criminal remedies reduce the need for §1983 suits where a clerk's unconstitutional conduct is neither wilful under the requirements of 18 U.S.C. §242 nor in violation of the specific prohibitions of the state criminal law. In light of the paucity of reported cases under these provisions, it is also significant that petitioner cites no evidence to show that they provide anything more than a purely theoretical alternative to the deterrent functions of §1983. *Cf. Ferri v. Ackerman,* 444 U.S. 193, 205 (1979) (where question of whether immunity is warranted depends upon empirical data, the question can most appropriately be answered by Congress). Furthermore, petitioner's own reliance on the threat of §1983

(footnote continued from preceding page)

7, 9. Neither the process by which any of these court functionaries acts nor the nature of their offices give assurance that constitutional rights will be protected. *See Butz v. Economou,* 483 U.S. 478, 512-13 (1978). *See also Grimm v. Arizona Board of Pardons and Paroles,* 115 Ariz. 260, 264, 564 P.2d 1227, 1231 (1977) ("The discretion of an administrative official is not that of a judge. By training and tradition, the trust placed in the judgment of a judge is not the same as that of an administrative officer.")

damage suits in order to assure his deputies' compliance with the procedures for recalling arrest warrants, J.A. at 20, shows that at one time such suits were the most effective deterrent that even he could think of in order to prevent the very harm suffered by respondent.

Petitioner's reference to a clerk's statutorily required bond as a sufficient alternative to §1983 liability, Pet. Br. 33, is similarly a make-weight argument. Such bonds, where they happen to exist, are wholly inadequate to safeguard constitutional rights. The minimum $5,000.00 amount of the bond under Illinois' "representative" bond statute, Pet. Br. 19, may be wholly inadequate compensation; the People, rather than the aggrieved individual, must bring the action on a bond such as petitioner's, *Hicks v. Aetna Insurance Co.*, 97 Ill. App.3d 828, 423 N.E.2d 584, 586 (1981); and the standards for recovery are vague, and probably exclude recovery for bad faith constitutional violations where the clerk nevertheless acts in conformance with his official duties.

Finally, in light of the variations in the degree of protection for the constitutionally aggrieved afforded by bond statutes among the states, it would be inappropriate to devise a federal law of immunity under §1983 in reliance upon the chance of a remedy under such a statute.[18] *See Martinez v. California*, 444 U.S. 277, 284 (1980) (state immunity statute does not control claim under §1983).

In sum, the public policy reasons that have heretofore justified absolute immunity do not override or even conflict

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[18]Some states exclude any recovery in favor of individuals under their bond statutes. *See, e.g., State ex rel Abdiehl v. Sriver*, 210 Ind. 129, 1 N.E.2d 579 (1936), *Graton v. City of Cambridge*, 259 Mass. 310, 156 N.E. 431 (1927); *Martin v. Magee*, 179 La. 913, 155 So. 433 (1934); *Ward v. Johnson*, 72 Ariz. 213, 232 P.2d 960 (1951).

in this case with the purposes of §1983 of providing compensation for and deterrence of constitutional violations. It is noteworthy that this Court has never decided a case in which the policy reasons for absolute immunity have been deemed to conflict with Congress' intent in enacting §1983. Although this Court's prior understandings of the limits of its role in statutory construction indicate that a choice between policy and congressional intent must be made in favor of the latter, the Court is saved from such choice in this case since policy and intent are congruent in requiring rejection of petitioner's claimed entitlement to absolute immunity.

IV.

MODERN FEDERAL AND STATE CASE LAW CONTRADICTS PETITIONER'S CLAIM OF SUBSTANTIAL PRECEDENT SUPPORTING A GENERAL RULE OF ABSOLUTE IMMUNITY FOR COURT CLERKS.

Petitioner claims the support of a body of modern federal circuit court and state common law precedent that is in fact overwhelmingly contrary to his position. He accomplishes this inversion of the weight of authority through two pervasive errors in case analysis. First, petitioner claims the support of cases that have been overruled or rendered unauthoritative by later cases in the same circuit, many of which he ignores. Second, he cites as controlling authority cases that support absolute immunity for clerks who are alleged to have fulfilled the duties required of them by court order, rule or statute. Such cases are inconclusive as to the

issue here of whether court clerks who fail to fulfill their mandated duties are immune. It is also significant that the majority of cases petitioner claims in support of absolute immunity were written prior to this Court's elaboration of the criteria for such immunity in cases extending from *Scheuer v. Rhodes,* 416 U.S. 232 (1974), through *Dennis v. Sparks,* 449 U.S. 24 (1980).

The two Eighth Circuit cases petitioner cites, *Davis v. McAteer,* 431 F.2d 81 (8th Cir. 1970), and *Rhodes v. Houston,* 202 F. Supp. 624 (D. Neb. 1962), *aff'd,* 309 F.2d 959 (8th Cir. 1962), *cert denied,* 372 U.S. 909 (1963), Pet. Br. 13, 28, no longer represent the position of that Circuit. In *McLallen v. Henderson,* 492 F.2d 1298, 1300 (8th Cir. 1974), the court rejected the rationale of the two prior cases in finding that "court functionaries such as clerks are not clothed in judicial immunity because their duties are ministerial, not discretionary in nature." *See also Barnes v. Dorsey,* 480 F.2d 1057, 1060 (8th Cir. 1973); *Norwood v. Solomon,* 431 F. Supp. 380, 382 (E.D. Mo. 1977), *aff'd mem.* 566 F.2d 179 (8th Cir. 1977) ("[judicial] immunity will not be granted where the action complained of is ministerial").

Petitioner similarly mischaracterizes the position of the Tenth Circuit by citing only *Hamrick v. Norton,* 322 F. Supp. 424 (D. Kan. 1970), *aff'd,* 436 F.2d 940 (10th Cir. 1971), which, after finding no constitutional violation, made a perfunctory reference to the existence of authorities that had granted court clerks immunity "for acts done in performance of their official duties." 322 F. Supp. at 426. Petitioner does not mention, however, *Henricksen v. Bentley,* 644 F.2d 852 (10th Cir. 1981), in which the Tenth Circuit recently concluded after canvassing the cases from other jurisdictions that absolute immunity is warranted for

court clerks only under extraordinary circumstances, and that "the courts which have considered the question have concluded that clerks are generally entitled to qualified immunity." *Id.* at 586. In reversing the dismissal of a § 1983 suit against a court clerk alleged to have interfered with the filing of a post-conviction review petition, the court in *Henricksen* noted that the clerk "has or may have a defense based on qualified immunity." *Id.*[19]

Petitioner's reliance on *Zimmerman v. Spears,* 428 F. Supp. 759 (W.D. Tex. 1977), *aff'd on other grounds,* 565 F.2d 310 (5th Cir. 1977), Pet. Br. 27, is also misplaced in light of the Fifth Circuit's subsequent, decisive rejection in *Williams v. Wood,* 612 F.2d 982 (5th Cir. 1980), of a general rule of absolute immunity for court clerks:

> A clerk of a federal court performing routine duties such as entering an order and notifying parties does not enjoy an absolute immunity from damages actions for injuries caused by that conduct. . . . Absolute immunity from damages actions applies only in a narrow range of actions for clerks of courts acting in a nonroutine manner under command of court decrees or under explicit instructions of a judge.

Id. at 984-85. *See also Tarter v. Hury,* 646 F.2d 1010, 1013 (5th Cir. 1981).

Petitioner's reliance on Third Circuit authority, Pet. Br. 26-27, is unpersuasive for two reasons. First, in both

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[19]The Tenth Circuit's most recent decision on court clerk immunity, *Wiggins v. New Mexico State Supreme Court Clerk,* 664 F.2d 812 (10th Cir. 1981), does not alter the Circuit's position stated in *Henricksen,* since *Wiggins* followed the general rule of absolute immunity for court clerks sued for obeying a court order. In *Wiggins,* the Clerk of the State Supreme Court had been sued for not granting plaintiff's writ of habeas corpus, which, as the Circuit Court found, was an act only courts were empowered to do. *Id.* at 815.

Lockhart v. Hoenstine, 411 F.2d 455 (3rd Cir. 1969) and *Ginsburg v. Stern,* 125 F.Supp. 596 (W.D. Pa. 1955), *aff'd,* 225 F.2d 245 (3rd Cir. 1955), the court clerks were sued for actions they took at the express direction of judges. As the court stated in *Raitport v. Provident National Bank,* 451 F. Supp. 522, 537 (E.D. Pa. 1978), these two cases "simply recognize a defense - obedience to a direct judicial order - that is '[s]imilar to the defense of proper performance of ministerial duties.' " (Citations omitted).

Petitioner's reliance on *Smith v. Rosenbaum,* 460 F.2d 1019 (3d Cir. 1972), also does not support his claim to the Third Circuit's support since, as the court in *Raitport* also pointed out, in light of this Court's more recent immunity decisions the Third Circuit has "take[n] a significantly more restrictive approach to absolute 'quasi-judicial' immunity than did the earlier decisions [including *Smith v. Rosenbaum*], and in particular they recognized that such immunity ordinarily exends only to officials performing 'quasi-judicial,' *i.e.,* adjudicatory or otherwise judgmental functions." 451 F. Supp. at 537-38. Having thus concluded that the Third Circuit would not now decide the question of a court clerk's immunity on the basis of its pre-*Wood v. Strickland* decisions, but "would approach the issue afresh in light of *Strickland* and *Imbler v. Pachtman,*" the court in *Raitport* held that the defendant clerk "cannot partake of absolute judicial or 'quasi-judicial' immunity." *Id.* at 538. *See also Crews v. Petrosky,* 509 F. Supp. 1199 (W.D. Pa. 1981) (clerk entitled to qualified immunity where duties are ministerial); *Allen v. Dorsey,* 463 F. Supp. 44, 47 (E.D. Pa. 1978) ("Although the Clerk of the Court and his agents have important duties in the judicial process, their duties, such as docketing and filing papers with the court, are ministerial and

mandatory acts which do not merit insulation from liability for damages by a grant of absolute 'quasi-judicial' immunity").

As revealed in petitioner's quotation from *Slotnick v. Garfinkle,* 632 F.2d 163 (1st Cir. 1980), Pet. Br. 26, the First Circuit recognizes absolute immunity for clerks who are sued for "carrying out the official directives of a judge." *Id.* at 166. That the First Circuit would not extend such immunity to clerks not acting in this special role as an "arm of the judge" is evident from its approval of *Williams v. Wood,* 612 F.2d 982 (5th Cir. 1980), which, as noted above, p. 41, found absolute immunity inappropriate in all circumstances except where a clerk acts in a non-routine manner under explicit court direction. *Slotnick v. Garfinkle,* 632 F.2d at 166.

In claiming the support of the Second Circuit, petitioner relies upon a district court's grant of absolute immunity to court clerks who had been sued for implementing a procedure for serving arrest warrants that had been approved by the judges of the Family Court. *Blouin v. Dembitz,* 367 F. Supp. 415 (S.D.N.Y. 1973), *aff'd on other grounds,* 489 F.2d 488 (2nd Cir. 1973). Absolute immunity was deemed necessary so that rules "protecting state judges in the discharge of their functions may not be circumvented or vitiated, by pretending to maintain this suit also against their 'clerks, servants and agents. . . .' " *Id.* at 422. There is no hint in *Blouin* that the court would have granted absolute immunity if the clerks had been sued for *not* implementing the procedures approved by the Family Court judges. Recent district court decisions within the Second Circuit demonstrate that the prevailing rule in that Circuit is to deny absolute immunity to court clerks who fail to perform ministerial duties. *Gutierrez v. Vergari,* 499 F. Supp. 1040,

1047 n.5 (S.D.N.Y. 1980); *Marty's Adult World of New Britain, Inc. v. Guida,* 453 F. Supp. 810, 816 (D.Conn. 1978). In denying absolute immunity for a court clerk's improper docketing of an appeal, the court in *Marty's Adult World* distinguished the cases holding court clerks absolutely immune on the ground that "[t]he court clerks' actions in the previous judicial immunity cases either were performed in the discharge of the clerks' lawful duties, not in neglect or violation of those duties, or were performed in accordance with judicial orders." *Id.* at 817.

The Sixth Circuit in *Denman v. Leedy,* 479 F.2d 1097, 1098 (6th Cir. 1973), did, as petitioner maintains, find a court clerk immune for an act performed "within the scope of his official quasi-judicial duties. . . ." However, the clerk's duty in *Denman* was that of fixing bail, which is functionally comparable to the type of discretionary decision-making for which judges are granted immunity. The case therefore does not support the grant of absolute immunity for court clerks who fail to perform ministerial duties. Moreover, the court in *Denman* did not specify whether the immunity was absolute or qualified. Several courts have construed *Denman* to afford court clerks only a qualified immunity for damages. *Williams v. Wood,* 612 F.2d 982, 985 n.2 (5th Cir. 1980); *Henricksen v. Bentley,* 644 F.2d 852, 855 (10th Cir. 1980); *German v. Killeen,* 495 F. Supp. 822, 831 (E.D. Mich. 1980).

Petitioner's claim that the Seventh Circuit's ruling here conflicts with its own precedent again fails to recognize that cases granting immunity for a clerk's proper performance of mandated ministerial duties are not inconsistent with cases such as this one, in which clerks fail to perform their ministerial duties and are therefore not entitled to absolute immunity. In *Panko v. Rodak,* 606 F.2d 168 (7th Cir.

1979), *cert. denied,* 444 U.S. 1081 (1980), the Clerk of the United States Supreme Court and his deputy were held immune from damages because their allegedly wrongful refusal to accept documents for filing was mandated by both Supreme Court Rule and this Court's holding in *Snider v. All State Administrators, Inc.,* 414 U.S. 685 (1974), which required the rejection of filings not in accordance with the Supreme Court Rules. 606 F.2d at 171. Similarly, in *Dieu v. Norton,* 411 F.2d 761, 763 (7th Cir. 1969), the court found that the clerk's allegedly wrongful act of denying a party a copy of a transcript was "in the discharge of [his] official responsibilities." Finally, in *Brown v. Dunne,* 409 F.2d 341 (7th Cir. 1969), the court clerks were deemed to have been carrying out their statutorily mandated duties in issuing summonses and certifying documents. Thus, in all prior Seventh Circuit decisions, and in contrast to this case, the alleged unconstitutional actions of the court clerks were in compliance with their mandated duties.

It is also noteworthy that, as the quotation from *Brown v. Dunne* in Petitioner's Brief at 29 reveals, the Seventh Circuit accepted the rationale of *Ex Parte Virginia,* 100 U.S. 339 (1879), in determining the availability of immunity on the basis of whether an official's acts are of a ministerial or judicial nature. 409 F.2d at 343. Had the court been faced with allegedly unconstitutional acts of court clerks that were as clearly ministerial as petitioner's here, this rationale presumably would have required the denial of the clerk's immunity.

The Ninth Circuit decisions cited by petitioner lend limited support to his claim of absolute immunity. *Morrison v. Jones,* 607 F.2d 1269 (9th Cir. 1979) (per curiam); *Stewart v. Minnick,* 409 F.2d 826 (9th Cir. 1969) (per curiam). In both cases, however, the grant of absolute

immunity was an alternative ground of decision, for which the court offered no rationale and dubious case support. In *Stewart v. Minnick* the complaint against the clerk and court reporter for failing to provide plaintiff with a portion of his criminal trial transcript was held barred by both res judicata and judicial immunity, which protected the clerk's and court reporter's acts "performed in their capacity as quasi-judicial officers." 409 F.2d at 826.

In *Morrison v. Jones* the court found no basis for concluding that the court clerk had caused any injury to the plaintiff, but proceeded to note that at best he might be charged "with some kind of responsibility for [plaintiff's] failure to receive notice of the May 5, 1975, order" and that "[h]is failure, if any, to perform a ministerial duty which was a part of judicial process is also clothed with quasi-judicial immunity." 607 F.2d at 1273. As in *Stewart v. Minnick*, no rationale is given for this broad dictum and the cases cited in its support are equivocal at best.[20]

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[20]*Denman v. Leedy*, 479 F.2d 1097 (6th Cir. 1973), found that court clerks were protected in their discretionary judicial-type judgments by an immunity that may have been only qualified. *See supra* 44. *Smith v. Rosenbaum*, 460 F.2d 1019 (3rd Cir. 1972), no longer represents the Third Circuit's position on absolute immunity. *See supra* p. 42. *Shuman v. California*, 584 F.2d 868 (9th Cir. 1978) referred only to a state trial judge's immunity for his role in presiding over a mandamus action. Finally, and most importantly, *Gillibeau v. City of Richmond*, 417 F.2d 426 (9th Cir. 1969), actually undercuts petitioner's broad reading of *Morrison's* absolute immunity dictum. The Ninth Circuit in *Gillibeau* denied absolute immunity to court officers because their unconstitutional actions in enforcing a Municipal Court judge's eviction order were not alleged to have been "performed solely at the direction of such a judge." Read in light of *Gillibeau*, *Morrison's* dictum on quasi-judicial immunity may stand only for the proposition that a clerk's failure to perform a ministerial duty is protected as "part of judicial process" when such nonperformance is at the direction of a judge. The facts in *Morrison* do not reveal whether the clerk failed to give notice of the court's order because of the judge's direction.

Most importantly, the Ninth Circuit's detailed analysis of the rationale for granting immunity under § 1983 in *Sellars v. Procunier,* 641 F.2d 1295 (9th Cir. 1981) makes clear that it would not now accept a rule of automatic absolute immunity for court functionaries who fail to perform ministerial duties. In applying the "functional comparability" test of *Butz v. Economou,* 438 U.S. 478 (1978), to the determination of the immunity of parole board members, the court found that state officials who are neither judges nor judge-like are not protected by absolute immunity because they "are not primarily adjudicators of disputes brought before them by advocates who legitimately expect impartial decisions." 641 F.2d at 1301. Since the court believed that *Butz* required it to "look not just to the title of a state or federal official, or to his or her location within the bureaucratic superstructure, but to the official's function as well in determining the question of immunity," *id.* at 1303, the Ninth Circuit would not now conclude that court clerks whose ministerial duties are not functionally equivalent to the adjudicative duties of judges should be granted absolute immunity simply because of their association with the judicial process.

Petitioner does recognize that his theory of absolute immunity is not supported by *McCray v. Maryland,* 456 F.2d 1 (4th Cir. 1972), which held that court clerks not acting in obedience to court order have no immunity from damages for failing to discharge their ministerial duties. Petitioner, however, portrays *McCray's* rejection of a rule of automatic absolute immunity for court clerks as the "minority rule in the Circuits." Pet. Br. 25. As the foregoing analysis of the federal court decisions reveals, however, the preponderance of recent authority in every circuit, except possibly the Ninth Circuit, rejects such a rule. Moreover,

McCray v. Maryland has become the leading case on the subject of court clerk immunity, having been cited with approval by courts in six other Circuits.

State court decisions with strong factual similarities to this case are in accord with the consensus of federal court decisions that absolute immunity does not protect court clerks sued for failure to perform ministerial duties. In *Connell v. Tooele City,* 572 P.2d 697 (Utah 1977), the court found that absolute immunity did not protect a court clerk who negligently caused plaintiff to be arrested twice, once because of the clerk's failure to record properly plaintiff's payment of a fine and once because of the clerk's failure to have plaintiff's arrest warrant recalled. The court found absolute immunity unwarranted because "if the employee's duties require no exercise of judgment or discretion, the reason for protecting his actions does not exist." *Id.* at 699.

In *Mauro v. County of Kittitas,* 26 Wash.App.538, 613 P.2d 195 (1980), the court found that absolute immunity did not protect various officials, including a clerk whose negligent failure to deliver an arrest warrant recall order to the sheriff's office caused plaintiff's arrest. There, as here, "[w]hat happened to the order withdrawing the warrant remains a mystery." *Id.* at 539, 613 P.2d at 196. The court's rationale for rejecting the clerk's claim of immunity applies equally here:

> "The act in this case was not a judicial act because the order had been executed by the judge. It was not a discretionary act but a purely ministerial act of a clerk of either the court or the sheriff's department."

Id. at 540, 613 P.2d at 197.

In *Dalton v. Hysell,* 381 N.E.2d 955 (Ohio App. 1978), the court found that absolute immunity did not protect a

court clerk who caused plaintiff's arrest by negligently failing to record his payment of a traffic fine. The court found no reason to apply judicial immunity for reasons fully applicable here:

> The Clerk was not carrying out a specific order of the court where judicial immunity would protect him from liability for the judicially mandated act. Nor is the instant case one in which discretion is involved where immunity may be granted on a public policy basis that a public official must be permitted freedom to perform his discretionary duties.

Id. at 956 (citations omitted).

Other state court decisions deny court clerks absolute immunity for the failure to perform similar ministerial duties: *Stine v. Shuttle,* 134 Ind.App. 67, 186 N.E.2d 168 (1962) (negligent issuance of an arrest warrant); *State v. Priest,* 152 S.W.2d 109 (Mo. 1941) (failure to issue executions on time); *Maddox v. Astro Investments,* 45 Ohio App.2d 203, 343 N.E.2d 133 (1975) (delay in docketing and indexing a judgment); *Calhoun v. City of Providence,* 390 A.2d 350 (R.I. 1978) (negligent failure to process a recall order of a capias).

The three state court cases petitioner cites offer little support for his theory of absolute immunity. *Yamamoto v. Santa Cruz County Board of Supervisors,* 124 Ariz. 538, 606 P.2d 28 (1980) is inapposite since absolute immunity was granted for a specific act undertaken by a court clerk "pursuant to the order of the superior court judge." *Id.* at 540, 606 P.2d at 30.

In *City of Louisville v. Bergel,* 610 S.W.2d 292 (Ky. 1980), a clerk was granted absolute immunity for her wrongful issuance of an arrest warrant because her duties in this regard were deemed to be "judicial functions." *Id.* at 293. Unlike petitioner's administrative or ministerial

actions here, the issuance of an arrest warrant upon a determination of probable cause is functionally comparable to the actions of judges in deciding cases.[21] Finally, in *Rodriguez v. State*, 55 Misc.2d 669, 285 N.Y.S.2d 896 (N.Y.Ct.Cl. 1967), the New York Court of Claims recognized the principle, denied by petitioner, that court clerks should not have immunity for acts which are ministerial in nature, such as keeping and certifying records. *Id.* at 673-74, 285 N.Y.S.2d at 901-01. However, for unexplained reasons, the court deemed the clerk's action in not notifying prison authorities of the plaintiff's probation termination to be of a quasi-judicial nature.

No state court decision, including *Rodriguez*, accepts the principle that clerks of courts should be absolutely immune for their failure to perform ministerial duties. Furthermore, *Rodriguez* is the only case that on its facts offers any support for the proposition that the delivery of arrest warrant recall orders to the police is a quasi-judicial rather than a ministerial function. In denying absolute immunity to court clerks charged with ministerial misfeasance similar to that alleged here, the great majority of state courts have joined a similar majority of federal courts in rejecting a general rule of absolute immunity for court clerks.

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[21]In finding that the clerk's issuance of a warrant was a judicial function, the court in *Bergel* relied upon *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), in which this Court held that court clerks could constitutionally issue arrest warrants since they have the capacity to make the evaluation of factual data necessary to a determination of probable cause. *Id.* at 351-52.

V.

THE QUESTION OF PETITIONER'S IMMUNITY, WHICH IS THE ONLY QUESTION BEFORE THIS COURT, WAS NOT, AND COULD NOT PROPERLY HAVE BEEN, RESOLVED ON THE BASIS OF PETITIONER'S SUMMARY JUDGMENT MOTION.

Petitioner maintains that the district court correctly granted summary judgment because his uncontradicted affidavits and documents "established the absence of a genuine issue of material fact and that petitioner enjoyed absolute judicial immunity. . . ." Pet. Br. 34. Since the district court did not address the issue of absolute immunity, Cert. Pet. 19a, which was raised in neither petitioner's summary judgment motion nor his supporting evidence, J.A. 15-24, petitioner's reliance on the rationale of the District Court's decision as a justification for his absolute immunity is illogical.

In supporting the District Court's grant of summary judgment petitioner appears to suggest that the evidence conclusively established the constitutionality of his conduct. Pet. Br. 35. Elsewhere, petitioner suggests the insufficiency of the Complaint's allegations of his unconstitutional conduct. Pet. Br. 25. Because these questions go to the merits of respondent's case, they are neither logically nor factually related to the Question Presented of petitioner's absolute immunity. The grant of such immunity defeats an action at the outset in order that an official need not defend the constitutionality of his conduct. *Tenney v. Brandhove,* 341 U.S. 367, 377 (1951); *Hampton v. City of Chicago,* 484 F.2d 602, 607 (7th Cir. 1973) (per Stevens, J.).

Petitioner's queries as to the merits of respondent's case cannot therefore appropriately be addressed until this Court resolves the Question Presented. Although respondent naturally disagrees with petitioner's suggestions that her underlying claim lacks merit, respondent has limited this Brief to the Question Presented, both because petitioner has not asked this Court to decide questions relating to the merits and because he could not properly do so under Supreme Court Rules 21(1) (a) and 34(1) (a).

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the decision of the Seventh Circuit Court of Appeals be affirmed and that petitioner's request for a holding that he is entitled to absolute immunity be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 80-2205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois,

Petitioner,

vs.

TONI MURRAY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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CERTIORARI GRANTED NOVEMBER 2, 1981

QUESTION PRESENTED

Whether absolute judicial immunity shields the Clerk of the Circuit Court of Cook County from §1983 damages liability when performing judicial or quasi-judicial functions.

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In The

Supreme Court of the United States

October Term, 1980

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois,

Petitioner,

vs.

TONI MURRAY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

ARGUMENT

ABSOLUTE JUDICIAL IMMUNITY SHIELDS THE CLERK OF THE CIRCUIT COURT OF COOK COUNTY FROM §1983 DAMAGES LIABILITY WHEN THE CLERK PERFORMS JUDICIAL OR QUASI-JUDICIAL FUNCTIONS.

A.

The Petitioner Is An Essential Officer Of The Court Who Enables The Court To Properly Perform Its Judicial Duties.

(Reply to Respondent's Argument I)

Petitioner argued in his brief that the clerk of the court enjoys absolute judicial immunity from §1983 damages liability when performing judicial or quasi-

judicial functions. Respondent has utterly failed to address the question raised by petitioner, the question upon which certiorari was granted by this Honorable Court. Instead, Respondent has argued throughout her brief, without support, that the clerk of the court is an executive official who either enjoys no absolute executive official immunity, or, at most, a qualified official immunity. Her response totally ignores the functions of the clerk of the court as those quasi-judicial functions relate to the judiciary in the context of judicial immunity.

Respondent bases her entire argument on the false premise that the clerk of the court is a member of the executive branch of government. Respondent provides absolutely no support for her assertion that the clerk is an executive official and ignores the test for judicial immunity enunciated by this Court in *Dennis v. Sparks*, 449 U.S. 24, 30 (1980). This Court held in *Dennis* that in order for petitioner to assert that he enjoys absolute judicial immunity, petitioner must establish that he "was actually performing a judicial act or was in any sense an official aide of the judge . . . in order that judicial duties may be properly accomplished." Respondent's analysis has completely ignored this Court's previous holding that the clerk of the court is a judicial officer (*Shadwick v. City of Tampa*, 407 U.S. 345 (1972)) and not an executive or legislative officer (Pet. Br. at 17-18), and thus, in every sense, is an official aide of the judge. See, *Dennis, supra.*

Petitioner has argued that the clerk of the court was historically part of the judicial branch of government in Illinois. (Pet. Br. 17) Since the filing of Petitioner's and Respondent's briefs in this cause the Illinois Supreme Court decided *Drury v. The County of McLean*, ... Ill. 2d ..... (Docket No. 54591, March 16, 1982). In *Drury*, the Illinois Supreme Court held:

> Under our constitution of 1970 the clerks of the circuit courts in this State are not county officials, but are non-judicial members of the judicial branch of State government. (Appendix A, p. 2a) . . . Under our present constitution, article VI, section 18(b), is substantially the same as article VI, section 20, of the 1870 Constitution as amended. (Appendix A, p. 4a)

Thus, the law is settled in Illinois that the clerk of the court is part of the judicial branch of government.

Amicus Curiae contend that petitioner is not a member of the judicial branch because "[h]e is an elected public official, with clear statutory duties . . . , answerable ultimately to the public . . . [and thus is] independent of any judge." (*Amicus* Br. at 11-12) This contention was recently rejected by the Illinois Supreme Court in *Drury, supra*, and was overwhelmingly rejected by this Court in *Shadwick v. City of Tampa*, 407 U.S. 345, 351 (1972) as follows:

> The municipal court clerk is assigned not to the police or prosecutor but to the municipal court judge for whom he does much of his work. In this sense, he may well be termed a "judicial officer." While a statutorily specified term of office and appointment by someone other than "an executive authority" might be desirable, the absence of such features is hardly disqualifying. Judges themselves take office under differing circumstances. Some are appointed, but many are elected by legislative bodies or by the people. Many enjoy but limited terms and are subject to re-appointment or re-election. Most depend for their salary level upon the legislative branch. We will not elevate requirements for the independence of a municipal clerk to a level higher than that prevailing with respect to many judges. The clerk's neutrality has not been impeached: he is removed from prosecutor or police and works within the judicial branch subject to the supervision of the municipal court judge.

Similarly, in the instant case, Petitioner's neutrality has not been impeached. The complaint is devoid of any allegations that Petitioner's duties included directing or supervising Respondent's arrest. No allegation has been made that Petitioner arrested Respondent. It is obvious that Petitioner is a member of the judicial branch of government.

Petitioner is not only a member of the judicial branch of government but has in all respects, in this case, functioned as an official aide of the court in order that judicial duties may be properly accomplished. In this case the Petitioner performed the quasi-judicial function of creating, devising and implementing warrant recall procedures in order that Presiding Judge Wachowski's General Order 74-8 (M), as well as the warrant recall orders of the circuit court judges, may be properly accomplished.

Respondent acknowledges that Petitioner's function, in addition to his status in the court system, determines whether Petitioner enjoys absolute judicial immunity. (Resp. Br. i, 47) However, although respondent acknowledges the "undeniable necessity of [the court clerk's] function . . . [as being] essential to the judicial process," (Resp. Br. at 31) respondent never addresses the issue of whether the court clerk's admitted quasi-judicial functions within the court system entitle him to judicial or quasi-judicial immunity. See *Blouin v. Dembitz*, 367 F.Supp. 415 (S.D. N.Y. 1973), *aff'd on other grounds*, 489 F.2d 488 (2d Cir. 1973). Instead, respondent and *amicus* argue, in the alternative, that petitioner enjoys no immunity when performing ministerial duties or antipodal discretionary-ministerial duties, (Resp. Br. at 3, 11, 16, 22, 24-25, 45), qualified executive official immunity when performing discretionary duties (Resp. Br. at 3, 6, 17, 31, 35) and absolute judicial immunity

when performing judicial or quasi-judicial functions. (Resp. Br. at 25, 35, 40-46) (*Amicus* Br. at 8).

However, as previously established, Petitioner is a member of the judicial branch of government not the executive branch. The uncontroverted facts in this case established through affidavits and exhibits that Petitioner is a member of the judicial branch who functions as an official aide to the judge in order that judicial duties may be properly accomplished. The uncontroverted affidavits and exhibits before the District Court clearly establish that Petitioner was not functioning as an executive within the court system. (J.A. at 16-24) (Pet. Cert. App. B at 17a) Therefore, respondent's attempt to apply any test for executive immunity has absolutely no relevance to the facts in the case at bar and must be rejected. Respondent has cited no authority of this Court that judicial immunity must be determined by the ministerial or discretionary nature of the judicial or quasi-judicial function. Judicial and quasi-judicial functions include both ministerial and discretionary duties performed by judges and court clerks. Neither duty is relevant to a discussion of judicial immunity. Respondent incongruously argues that court clerks are liable for performance of ministerial duties, yet admittedly immune when acting without discretion pursuant to court orders. (Resp. Br. 3, 25 n. 25) Judicial immunity for court clerks does not depend on a distinction between ministerial and discretionary duties but rather depends on whether or not the clerk performed quasi-judicial functions in order that the court may properly accomplish its judicial duties.

In the instant case, Petitioner, Morgan M. Finley, the Clerk of the Circuit Court of Cook County, Illinois, enjoys absolute judicial or quasi-judicial immunity for doing his job as "an arm of the judge" (Resp. Br. at 43) by creating warrant recall procedures in order that

Judge Wachowski's General Order 74-8(M) may be properly implemented. Petitioner's deputy clerks similarly enjoy absolute judicial or quasi-judicial immunity when performing their duties in order that Judge Wachowski's General Order 74-8(M) and each individual judge's warrant recall orders (here Judge Goldstein's order) may be properly implemented.

B.

Historical And Public Policy Considerations Are The Foundation For Petitioner's Absolute Immunity From §1983 Damages Liability.

(Reply to Respondent's Argument II. and III.A., B.1. and 2.)

In arguing that there is no basis in the common law for the immunity of the court clerk, respondent has totally ignored this Court's previous holdings in *Dennis v. Sparks*, 449 U.S. 24 (1980), *Bradley v. Fisher*, 80 U.S. 646 (13 Wall. 335) (1872), and *Pierson v. Ray*, 386 U.S. 547 (1967). In *Bradley v. Fisher, supra*, this Court held that at common law judges were immune from damages liability. In *Pierson v. Ray*, 386 U.S. 547 (1967), this Court held that judges were immune from damages liability under §1983 and recognized that, "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." *Id.* at 553-554. In *Dennis v. Sparks, supra*, this Court further explained its previous holdings by stating that if a person "was actually performing a judicial act or was in any sense an offical aide of the judge . . . in order that judicial duties may be properly accomplished," then the judge's absolute immunity would also cloak that person. *Dennis, supra*, 449 U.S. at 30.

Respondent contends that court clerks enjoyed no common law immunity because they performed ministerial duties. In contrast, however, courts historically found the clerk immune from liability when he functioned as an official aide of the court and performed quasi-judicial functions pursuant to court order or decree in order that judicial duties could properly be accomplished. These courts so held without regard to the ministerial nature of the acts. *Davidson v. Wiley Bank and Company*, 31 Ala. (Book 25) 452 (1858); *Hoeffner v. Stratton*, 57 Me. 360, 362 (1869); and *Commonwealth v. Thompson*, 65 Ky. (2 Bush) 559 (1866). Respondent concedes that if the court clerk "was actually carrying out a court order" (Resp. Br. at 19) this quasi-judicial function was a "defense at common law" (Resp. Br. at 19) to a cause of action against the court clerk.

In support of respondent's argument that court clerks enjoyed no immunity because they performed ministerial duties, respondent relies heavily on this Court's early cases concerning damages liability against municipalities and executive county officials. Respondent has cited *Amy v. Supervisors* (sub nom. *Amy v. Barkholder*) 78 U.S. 136 (1871) (Resp. Br. at 12), as the leading common law authority that court clerks were liable in damages for their failure to perform ministerial duties. However, the defendants in *Amy* were Des Moines County Supervisors, not court clerks. The *Amy* decision, therefore, is inapposite to the case at bar because the Clerk of the Circuit Court of Cook County, Illinois, was historically an official in the judicial branch of government not an executive county official. See *Drury v. The County of McLean, supra*, ... Ill. 2d ..... (Docket No. 54591, March 16, 1982). (Appendix A, pp. 1a-10a)

Respondent's reliance on *Marsh v. The Board of Supervisors of Fulton County*, 77 U.S. 676 (1870), is sim-

ilarly misplaced. (Resp. Br. at 13) In *Marsh*, the defendants were the Board of Supervisors of Fulton County not the court clerk. The cause of action in *Marsh* was based on the conduct of the court clerk in his capacity as county clerk not in his capacity as court clerk. Therefore, *Marsh* fails to support respondent's argument that the court clerks were liable for their failure to perform ministerial duties. The court clerk in *Marsh* was an executive county official answerable to the Board of Supervisors, not the county court. Unlike Petitioner, the county clerk was not acting as an official aide to the court.

Respondent also relies on *Johnston v. District of Columbia*, 118 U.S. 19 (1886), in support of her contention that petitioner deserves no immunity for improper performance of ministerial duties. However, *Johnston* involves municipal liability, not the liability of an official aide to the judge, such as Petitioner. Therefore, this case provides no common law support for Respondent's argument.

In *Ex Parte Virginia*, 100 U.S. 339, 348 (1879), cited by Respondent (Resp. Br. at 18), this Court held that a state court judge acted in the clear absence of his jurisdiction, in direct violation of a statute and outside the scope of his authority, when he excluded black men from juries on the basis of race. Contrary to Respondent's contention (Resp. Br. at 18), *Ex Parte Virginia* provides no support for her argument. *Ex Parte Virginia* was not a civil damages suit against a judge but rather a *mandamus* action. Furthermore, Respondent is manifestly incorrect when she states that her complaint "has alleged that petitioner acted contrary to court orders both to recall the warrant for respondent's arrest and to implement adequate procedures" to do so. (Resp. Br. at 18) The complaint admits that Peti-

tioner acted within the scope of his authority by "defining and instituting effective practices and procedures to insure that the recall of an arrest warrant is communicated" to the Chicago Police Department. (J.A. 5) Nowhere in the complaint does Respondent allege that Petitioner acted in direct violation of any court order or outside the scope of his authority.

Furthermore, the Seventh Circuit Court of Appeals in *Brown v. Dunne*, 409 F. 2d 341, 349 (7th Cir. 1969), recognized that judicial immunity for court clerks transcended labelling the clerk's duties as ministerial in order to fix liability. In *Brown*, the Seventh Circuit held:

> But if the term ministerial is used as the Court in *Ex Parte Virginia*, 100 U.S. 339, 348, 25 L.Ed. 676 (1879) used it, it is plain that the charges [of mere errors or irregularities] against the judge, magistrate and clerks comprehend judicial rather than ministerial functions and therefore, do not remove their official immunity.

Moreover, the cases of *Hicks v. Dorn*, 42 N.Y. 47 (1870), *Buck v. Colbath*, 70 U.S. (3 Wall.) 334 (1865), *McCord v. High*, 24 Iowa 336 (1868) and *Owen v. City of Independence*, 445 U.S. 622 (1980), cited by respondent, do not support her argument because all of these cases deal with the liability of executive officials and municipalities rather than clerks who act as official aides to the judge in order that judicial duties may be properly accomplished.

This Court in *Polk County v. Dodson*, ... U.S. ....., 102 S.Ct. 445, 452 (1981), recognized that the court system today is laboring under "unprecedented strains." The clerk of the court, today more than ever before, as an arm of the court, is responsible for keeping the judicial machinery functioning. This Court recognized the neces-

sary functions of the clerk as aide to the judge in *Ex Parte Morgan*, 114 U.S. 174 (1885). Certainly, there were compelling reasons to find that the clerk was immune from damages liability at common law and those reasons, are even more compelling today.

Fear of §1983 suits will neither prevent a court clerk, like petitioner, from creating imperfect court procedures nor deter a deputy clerk from inadvertently misplacing one in a thousand court files. Instead, fear of §1983 liability will deter court clerks like petitioner from performing their essential quasi-judicial functions in the court system. Fear of removal from office, accountability to the judge to whom the clerk is answerable, fear of state and federal criminal prosecution and fear of state civil damages liability more than sufficiently keep court clerks' conduct in check. If this Honorable Court refuses to extend absolute judicial immunity to court clerks, federal court dockets will be flooded with §1983 suits against court clerks, with allegations from losing a court file to creating inadequate court procedures designed to alleviate the stress on the judicial process buckling under unprecedented strains. Absolute judicial immunity promotes fairness to court clerks who otherwise would be sued instead of their immune judges who they serve, when clerks perform their quasi-judicial functions of implementing court orders. *McCray v. Maryland*, 456 F.2d 1, 5 n.11 (4th Cir. 1972). Absolute judicial immunity will prevent the federal judicial process from being disrupted by a predictable flood of §1983 litigation against court clerks and will prevent the state judicial process from being disrupted by overburdened court clerks inhibited from performing their numerous judicial and quasi-judicial functions in the ever-expanding state court system.

C.

Petitioner's Absolute Judicial Immunity From §1983 Liability Is The Majority Rule Followed By The Circuit Courts of Appeals.

(Reply to Respondent's Argument IV)

Despite the argument advanced by respondent, all of the modern federal cases cited by petitioner are still authority in support of the clerk's judicial immunity.

Respondent contends that the First Circuit recognizes absolute judicial immunity for court clerks only when they act in a non-routine manner under explicit court direction. (Resp. Br. at 43) Respondent fails to mention that the First Circuit in addition to relying on *Williams v. Wood*, 612 F.2d 982 (5th Cir. 1980), relied on its own holding in *Slotnick v. Stavisky*, 560 F.2d 31 (1st Cir. 1977) in which the court held that the clerk of the court enjoyed absolute judicial immunity when performing judicial or quasi-judicial functions.

With respect to the Second Circuit respondent cannot point to any case which overrules the holding in *Blouin v. Dembitz*, 367 F.Supp. 415 (S.D. N.Y. 1973), *aff'd on other grounds*, 489 F.2d 488 (2d Cir. 1973). At most *Marty's Adult World of New Britain, Inc. v. Guida*, 453 F.Supp. 810 (D. Conn. 1978) cited by respondent, recognized a split in the Circuits over the issue of court clerk immunity and that this Court "has not yet had occasion to address this issue." *Id.* at 815. Furthermore, it is unclear from the facts in *Marty's Adult World* whether the tasks required of the clerk were quasi-judicial functions performed in order that judicial duties may be properly accomplished.

Respondent contends that the rule of *Smith v. Rosenbaum*, 460 F.2d 1019 (3d Cir. 1972) no longer has vitality in the Third Circuit. In making this statement she relies

solely on district court cases. She cannot point to any decision of the Third Circuit which overrules *Smith*.

Despite respondent's reliance on *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972) and her attempt to show that the holding undercuts petitioner's argument, *McCray* clearly supports petitioner's argument that a court clerk is absolutely immune from liability when he acts as an official aide of the judge in order that the court's judicial duties may be properly accomplished. See *Dennis v. Sparks*, *supra*. The factual situation in *McCray* is totally inapposite to the facts in the instant case. In *McCray*, the undisputed allegation made at the initial pleading stage was that the defendant clerk impeded the filing of plaintiff's papers. It is undisputed however that in the instant case the clerk was following required court-ordered procedures. Moreover, *McCray* clearly holds that if a "clerk has a defense that he was acting pursuant to his lawful authority or following an order of the Court, that defense must be raised and established before the complaint can properly be dismissed or judgment entered for the defendant." *Id.* at 5. In fact, in the instant case petitioner asserted both of these defenses in a motion to dismiss and/or for summary judgment which was supported by uncontroverted affidavits and exhibits in the District Court below. (J.A. 16-24, 31) Moreover, although it is petitioner's contention that *McCray* was improperly decided on the basis that the holding rested on a ministerial-discretionary test for judicial immunity for court clerks, the opinion, nevertheless, recognized that court clerks are immune when as official aides of the judge they act in a manner such that judicial duties may be properly accomplished. *Id.* at 5.

Although respondent contends that petitioner does not enjoy absolute judicial immunity in this case, she relies on *Williams v. Wood*, 612 F.2d 982 (5th Cir. 1980) and

Tarter v. Hury, 646 F.2d 1010 (5th Cir. 1981) for support. However, both cases clearly hold that court clerks like petitioner enjoy "absolute immunity from actions for damages arising from acts they are specifically required to do under court order or at a judge's direction." *Tarter, supra*, 646 F.2d at 1013.

Respondent contends *Denman v. Leedy*, 479 F.2d 1097 (6th Cir. 1973) supports only a qualified immunity for court clerks. (Resp. Br. at 44, 46 n. 20) Yet, the Sixth Circuit's recent opinion, *Thompson v. Woltenberg*, 665 F.2d 1047 (6th Cir. 1981), pet. cert. pending, 50 U.S.L.W. 3720, (unpublished opinion) (see Appendix B, pp. 11a-12a), relied on *Denman* and held that "it is well established that an individual performing a ministerial duty at the direction of a judge acting in an official capacity is immune from suit." (Appendix B, p. 12a)

The Eighth Circuit case of *McLallen v. Henderson*, 492 F.2d 1298 (8th Cir. 1974) cited by respondent for the proposition that *Davis v. McAteer*, 431 F.2d 81 (8th Cir. 1970) is no longer the law in that Circuit, is not apposite. *McLallen* was a case in which a court reporter was sued, not the court clerk. *McLallen*'s reference to court clerks was *dicta*, and the opinion nowhere cites to *Davis*. Furthermore, the Fifth Circuit recognizes the continued vitality of *Davis* in *Williams v. Wood, supra*, 612 F.2d at 985 n. 4.

Henricksen v. Bentley, 644 F.2d 852 (10th Cir. 1981), cited by respondent as support for her argument (Resp. Br. at 40), actually supports petitioner. The Tenth Circuit recognized that the court clerk enjoyed absolute judicial immunity "where performance of judicial acts or activity as an official aide of the judge is involved. *Dennis v. Sparks*, ... U.S. ....., 101 S.Ct. 183, 66 L.Ed. 185 (1980)." *Henricksen* recognized that

Denman v. Leedy, supra, and *Smith v. Rosenbaum, supra,* held that "clerks of courts have been ruled immune to suit under §1983 when performing 'quasi-judicial' duties." *Henricksen,* 644 F.2d at 855. Therefore, it is clear that all of the cases cited by petitioner demonstrate that petitioner enjoys judicial immunity as an official aide of the court in order that judicial duties may be properly accomplished.

D.

Available Alternatives To §1983 Liability For Clerks Of The Court Provide Superior Methods For Insuring That The Public Is Able To Remedy A Court Clerk's Misconduct.

(Reply to Respondent's Argument III. B. 3)

Respondent contends that no alternative remedies to a §1983 damages action justify the grant of absolute immunity to petitioner. (Resp. Br. at 37) Yet, respondent admits that there are statutory and common law bases for alternative criminal and civil remedies available to her in state court. (Resp. Br. at 7 n.3)

Respondent cites *People v. Gill,* 30 Ill. App. 2d 32 (1st Dist. 1961), a case which upheld indictments against the defendant, the Clerk of the Municipal Court of Chicago, who was indicted for palpable omission of duties imposed upon him by Illinois statutes. *Gill* makes clear that the court clerk is subject to criminal liability for palpable omissions of duty. Ill. Rev. Stat. 1959, ch. 38, §449. The criminal felony statute under which Gill was indicted remains viable as Ill. Rev. Stat. 1973, ch. 38, sec. 33-3, and was in effect at the time of respondent's arrest. In addition to approving criminal penalties against the court clerk, the Court in *Gill,* as Respondent points out, held that Illinois Revised Statutes, 1959, Chapter 25 "section 10 makes the clerk civilly responsi-

ble for the acts of his deputies and makes him answerable to his own court for their acts . . ." *Id.* at 51. Additionally, as in a §1983 action, in Illinois, Respondent would be entitled to a jury trial in a suit for damages against the court clerk. Ill. Const. Art. I, §13; Ill. Rev. Stat. 1979, ch. 110, §64. Therefore, in addition to the remedies discussed in petitioner's brief (Pet. Br. at 32-33), respondent concedes that the above civil and criminal remedies in state court were available to vindicate her private rights.

E.

The District Court Properly Granted Summary Judgment For The Petitioner Where No Genuine Issue Of Material Fact Existed That The Petitioner Enjoyed Absolute Judicial Immunity.

(Reply to Respondent's Issue V)

Respondent contends that the question of petitioner's judicial immunity could not have properly been resolved on the basis of petitioner's summary judgment motion. (Resp. Br. 51) Respondent contends that this question was not presented to the District Court and that further discovery is necessary to determine petitioner's judicial immunity. These contentions are without factual or legal support. Petitioner raised and briefed the issue of his absolute judicial immunity from §1983 damages liability both in the United States District Court for the Northern District of Illinois, and in the Seventh Circuit Court of Appeals. (Pet. Cert. App. A at 5a n. 4, 6a-7a.)

Moreover, no further discovery is necessary in the District Court below to determine whether petitioner failed to implement warrant recall procedures. (Resp. Br. at 8) Respondent ignores Petitioner's uncontroverted affidavits and exhibits submitted in the District Court below (Pet. Cert. App. B. at 19a) which establish that Petitioner

implemented warrant recall procedures on the very same day that Judge Wachowski entered General Order 74-8(M). (J.A. 19-21, 23-24) Furthermore, the uncontroverted affidavit of Deputy Clerk McNicholas (J.A. 21-22), who respondent has never named as a defendant, and respondent's warrant recall order (J.A. 18), conclusively established that petitioner's warrant recall procedures were in effect and implemented by Deputy Clerk McNicholas in respondent's criminal case.

Respondent and *Amicus* both contend that the dismissal of the Petitioner will deprive Respondent of her right to discovery. Both Respondent and *Amicus* fail to mention that this case is still pending in the District Court where one municipal defendant, the City of Chicago, and five individual defendants, Chicago Police Officers, are still party defendants. Therefore, discovery to determine the remaining defendants' liability for their alleged unconstitutional conduct is still available to Respondent. No discovery is necessary to determine whether Petitioner directed or supervised the Respondent's arrest because there are no allegations made in the complaint that Petitioner had anything whatsoever to do with Respondent's arrest.

No genuine issue of material fact exists that petitioner was an official aide of the court when he created warrant recall procedures in order that General Order 74-8(M) may be properly accomplished. Fed. R. Civ. P. 56(e). (J.A. 19-20) Clearly, the uncontroverted affidavits and exhibits established that Petitioner was entitled to summary judgment on the basis of judicial immunity as a matter of law.

Respondent and *Amicus* both contend that Petitioner can be held liable for the acts of his deputies under the theory of *respondeat superior*. (Resp. Br. at 7, n. 3, 26;

Amicus Br. at 12) This theory of liability has consistently been rejected by this Court in decisions ignored both by Respondent and *Amicus*. In *Polk County v. Dodson*, ... U.S. ....., 102 S.Ct. 445, 453 (1981) this Court held:

> Section 1983 will not support a claim based on a *respondeat superior* theory of liability. *Monell v. Department of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). To the extent that Dodson's claims rest on this basis, they fail to present a federal claim.

Amicus and Respondent both contend that Petitioner is liable for failing to properly perform his supervisory responsibilities. (Resp. Br. at 26; *Amicus* Br. at 12) In so arguing both Respondent and *Amicus* again ignore this Court's recent decision in *Polk County v. Dodson*, ... U.S. ....., 102 S.Ct. 445, 454 (1981), reaffirming the viability of *Rizzo v. Goode*, 423 U.S. 362 (1976) and *Monell v. Department of Social Services*, 436 U.S. 658 (1978), that a "general allegation of administrative negligence fails to state a constitutional claim cognizable under Sec. 1983." Furthermore, contrary to *Amicus'* contention, (*Amicus* at 12) Petitioner cannot be held liable under §1983 for a failure to properly perform his supervisory responsibilities where Respondent never specifically alleged anywhere in the complaint that Petitioner failed to adequately train or supervise his deputy clerks. (J.A. 2-11) Moreover, nowhere in Respondent's complaint does there appear the bald allegation made here for the first time that petitioner's procedures for sorting and delivering warrant recall orders were of a "haphazard nature." (Resp. Br. at 2) Respondent only pled her one isolated incident in her complaint and petitioner in response is not required to plead the absence of other incidents in order to establish that no custom or policy exists. *Monell, supra.* Therefore, the District

Court not only properly granted summary judgment, but could have properly granted summary judgment for petitioner on the basis of judicial immunity or in the alternative could have granted petitioner's motion to dismiss on the grounds that the complaint failed to state a cause of action under *Polk County v. Dodson, supra.*

CONCLUSION

For the foregoing reasons, Morgan M. Finley, the Clerk of the Circuit Court of Cook County, respectfully submits that this Court should reverse the judgment of the Seventh Circuit Court of Appeals, should uphold the order of the District Court granting summary judgment for the petitioner, and hold that the petitioner is entitled to absolute judicial immunity.

Respectfully submitted,

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APPENDIX A

Docket No. 54591—Agenda 56—September 1981.

JACK M. DRURY *et al.*, Appellees, v. THE COUNTY OF MCLEAN, Appellant.

CHIEF JUSTICE RYAN delivered the opinion of the court:

Plaintiffs, Jack M. Drury and Raymond Brezinski, filed suit against the defendant, McLean County, seeking reimbursement of fine money and costs they paid to the clerk of the circuit court of that county after plaintiffs had been convicted under a statute later held unconstitutional. The circuit court denied class certification pursuant to our decision in *McCabe v. Burgess* (1979), 75 Ill. 2d 457, and granted summary judgment in favor of the named plaintiffs as to the amount of court costs paid to the county. The court denied summary judgment in favor of plaintiffs for reimbursement of fine money, ruling that the clerk was not a county official and that, therefore, payment to the clerk could not be payment to the county. The appellate court reversed, with one justice dissenting. (92 Ill. App. 3d 83.) We granted leave to appeal. We now reverse the appellate court.

Plaintiffs were convicted, and each paid a fine and court costs under the Uniform Narcotic Drug Act (Ill. Rev. Stat. 1969, ch. 38, par. 22-1 *et seq.*). That act, as it related to marijuana, was declared unconstitutional in *People v. McCabe* (1971), 49 Ill. 2d 338. Subsequently, this court held that all those convicted under the Act had a right to the expungement of their convictions and

the return of any fine money and court costs attributable to those convictions. (*People v. Meyerowitz* (1975), 61 Ill. 2d 200.) Plaintiffs now seek to be reimbursed the fine money from the defendant County of McLean. The fine money was paid by the plaintiffs to the clerk of the circuit court, and that clerk distributed the money, one-half each to the town of Normal and the State of Illinois, apparently pursuant to the Drug Abuse Control Act (Ill. Rev. Stat. 1969, ch. 111½, par. 810), rather than under the appropriate statute (Ill. Rev. Stat. 1969, ch. 53, par. 18a). The County of McLean never received any of the fine money paid by the plaintiffs but did receive the costs which they paid.

Plaintiffs argue that the clerk of the circuit court is a county official and that, therefore, money received by the clerk as a county official is also received by the county. The primary issue then is whether the clerk of the circuit court of McLean County is a county official. We hold that under our constitution of 1970 the clerks of the circuit courts of this State are not county officials, but are nonjudicial members of the judicial branch of State government. This being so, the circuit clerk is not an agent of the county, and the county is not liable for fine money paid to the circuit clerk but never received in its treasury.

Historically, the circuit court clerks were elected county officials. (Ill. Const. 1870, art. X, sec. 8.) The office was specially mentioned in article X, section 8, which provided for the election of county officers. However, the new judicial article of the 1870 Constitution adopted in 1962, which was effective January 1, 1964, provided that the General Assembly "shall provide by law for the selection by the judges or election, terms of office, removal for cause and salaries *of clerks and other non-judicial officers* of the various courts; * * *."

(Emphasis added.) (Ill. Const. 1870, art. VI (1964), sec. 20.) Confusion was created as to the status of clerks of the circuit courts following the 1962 amendment to article VI of our constitution. The amendment, in the language quoted above, refers to clerks as nonjudicial officers of the court, and does not distinguish between clerks of the circuit courts and clerks of the appellate and supreme courts. However, article X, section 8, of the 1870 Constitution was not specifically repealed or amended in 1962, and clerks of the circuit court were still referred to in the 1870 Constitution as county officers. By virtue of section 8 of article X, circuit clerks were not only county officers, but also were required to be elected, and their terms of office were fixed at four years. Under the 1962 amendment to article VI, the General Assembly had the authority to determine whether the clerks of the circuit court should be elected or appointed by the judges and to provide for the term of office. Also, under the amendment, as noted above, circuit court clerks became nonjudicial officers of the court.

In *Johnson v. State Electoral Board* (1972), 53 Ill. 2d 256, this court, applying general principles of statutory construction, held that the more recent provisions of the 1962 amendment to article VI abrogated the provisions of section 8, article X, which were inconsistent with the amendment. The court held that, because of such inconsistencies, section 8 of article X, governing the election of circuit court clerks, had been impliedly repealed by the amendment.

Applying the same reasoning, the provisions of article X, section 8, designating circuit court clerks as county officers were likewise impliedly repealed by the inconsistent provisions of section 20 of article VI of the 1962 amendment, which classifies all clerks as nonjudicial of-

ficers of the court. The fact that the 1962 amendment authorized the General Assembly to provide for the appointment instead of the election of clerks as required by section 8 of article X, to provide for the term of office instead of the term of four years, as set out in section 8 of article X, and designated clerks as nonjudicial officers of the court instead of county officers as in section 8 of article X, impliedly repealed section 8 of article X of the 1870 Constitution as it applied to clerks of the circuit court.

Under our present constitution, article VI, section 18(b), is substantially the same as article VI, section 20, of the 1870 Constitution, as amended. Section 18(b) of the judicial article of the 1970 Constitution provides:

> "(b) The General Assembly shall provide by law for the election, or for the appointment by Circuit Judges, of clerks and other non-judicial officers of the Circuit Courts and for their terms of office and removal for cause." (Ill. Const. 1970, art. VI, sec. 18(b).)

The Committee on Judiciary, in its comments, said that "[i]t [the proposal] would leave untouched the existing provisions which gave the legislature the option of providing for the appointment by the judges, or the *election, of clerks and other non-judicial officers of the circuit courts.*" (Emphasis added.) 6 Record of Proceedings, Sixth Illinois Constitutional Convention 1057-58 (hereinafter cited as Proceedings.)

The debates of the Sixth Illinois Constitutional Convention reflect the understandings of the delegates that the judicial article of 1962 changed the status of the circuit court clerk from county officer to a nonjudicial officer of the judicial branch of State government and that the convention desired to continue this change. (4 Proceedings 2630-40.) In discussing a proposal by

Delegate Dunn that the circuit court clerk be made to turn over fees to the county treasurer, Delegate Parkhurst stated:

> "Now, the trouble is that the circuit clerk by definition is no longer a county official. He is now, by the mandate of the judicial article, as indeed it has been since 1962, he is now an official of the court system. He is not a county officer. * * *" (4 Proceedings 2633.)

This understanding was reflected throughout the debates during the discussion of various proposed amendments both to the judicial article (article VI) and the local government article (article VII). See 4 Proceedings 2631, 2632, 2638, 2639, 3412.

We have previously acknowledged that in construing the Constitution the true inquiry concerns the understanding of the meaning of its provisions by the voters who adopted it. However, the practice of consulting the debates of the members of the convention which framed the constitution has long been indulged in by courts in determining the meaning of provisions which are thought to be doubtful. (*People ex rel. Keenan v. McGuane* (1958), 13 Ill. 2d 520, 527.) The debates, therefore, aid in determining the intent of the drafters of the Constitution.

The debates of the Sixth Illinois Constitutional Convention reveal that the drafters intended the clerk of the circuit court to be a nonjudicial member of the judicial branch of the State government. The convention rejected amendments attempting to include references to the circuit court clerks in the local government article. It was the clear understanding of the delegates that they were continuing the constitutional changes that had been effective since January 1, 1964—namely, moving the clerk of the circuit court from the county officers section

of the 1870 Constitution to the article on the judiciary. Further support for our conclusion is found in the local government article of our constitution of 1970 covering county officers, which does not mention or provide for the position of a clerk of the circuit court. (Ill. Const. 1970, art. VII, sec. 4.) In the Committee on Local Government report on county officers, it states that "[t]he new section would eliminate as mandatory constitutional officers in each county certain officers enumerated in the present Constitution, namely * * * the clerk of the Circuit Court * * *." 7 Proceedings 1703.

Article VII, section 4(c), also states that county "[o]ffices other than sheriff, county clerk, [and] treasurer * * * may be *eliminated* * * * by county ordinance." (Emphasis added.) (Ill. Const. 1970, art. VII, sec. 4(c).) The result, if we were to hold that the clerk was a county officer, would be that any county could eliminate the office of clerk of the circuit court. The Constitution vests the judicial power in a "Supreme Court, an Appellate Court and Circuit Courts." (Ill. Const. 1970, art. VI, sec. 1.) In *Ampersand, Inc. v. Finley* (1975), 61 Ill. 2d 537, this court held unconstitutional a Cook County ordinance which directed the circuit court clerk to collect a fee when each party filed a pleading or other appearance in circuit court. In *Ampersand* the court stated:

> "However, the amendment to article VI of the Constitution of 1870, effective January 1, 1964, established a unified court system throughout this state. * * * The same scheme prevails under the 1970 Constitution. Only one unified court system operating statewide is contemplated. Article VI of the 1970 Constitution does not contemplate nor does it authorize the exercise of *any control over* or permit the imposition of a burden on *the judicial system by any local entity.*

> The administration of justice under our constitution is a matter of statewide concern and does not pertain to local government or affairs." (Emphasis added.) (*Ampersand, Inc. v. Finley* (1975), 61 Ill. 2d 537, 542.)

Implicit in this language is the fact that the clerk of the circuit court must be a member of State government, not subject to the control of any local government. We could not permit the administration of justice to hinge on the passage of a county ordinance abolishing the essential position of the clerk of the circuit court. We conclude that the clerk of the circuit court is a nonjudicial member of the judicial branch of State government and not a county officer.

We acknowledge that county boards are still required by law to provide for the payment of expenses of the office of the clerk of the circuit court and, within statutory limits, to fix the salary of the clerk. Section 18(c) of article VI of our constitution provides:

> "(c) The salaries of clerks and other non-judicial officers shall be as provided by law." (Ill. Const. 1970, art. VI, sec. 18(c).)

The legislature has provided by law that the county boards throughout the State are to pay the salary of the clerk. (Ill. Rev. Stat. 1979, ch. 25, par. 27.3.) It is within the legislature's constitutional powers to require that counties pay the salary and expenses of the circuit court clerk. The fact that counties pay the salaries and expenses of circuit court clerks does not make the office of circuit court clerk a county office.

The plaintiff relies on our decision in *People v. Meyerowitz* (1975), 61 Ill. 2d 200, to impose liability on the county for reimbursement of the fine money. In *Meyerowitz* we held that all defendants convicted under

the Act were entitled to reimbursement of court costs and fine money and that in the interest of judicial economy separate proceedings were not necessary to obtain that reimbursement, even though the county was not a named party. In *Meyerowitz*, the fine money had been paid to and received by the county. In the present case, however, the fine money was paid to the clerk of the circuit court, a member of the judicial branch, and distributed by the clerk to the State of Illinois and the town of Normal. The county cannot be held liable here, since the fine money was not collected by one of its officers and the money was never received in the county treasury. *Meyerowitz* is clearly inapplicable.

The appellate court and the plaintiffs in this cause have relied on our statement in *Meyerowitz* that "[a]n action to recover fine monies paid under an unconstitutional statute * * * resemble[s] the common law action for money had and received" (61 Ill. 2d 200, 212). An action for money had and received in the nature of an action in assumpsit is maintainable where defendant has received money which in equity and good conscience belongs to the plaintiff. (*Board of Highway Commissioners v. City of Bloomington* (1911), 253 Ill. 164, 174; *National Malleable Castings Co. v. Iroquois Steel & Iron Co.* (1929), 333 Ill. 588; see 27 Ill. L. & Prac. *Money Lent, Paid, or Received* (1956).) Although the plaintiffs may be legally entitled to the fine money, the defendant here never received it. Furthermore, as we stated earlier, the clerk of the circuit court is not a county officer, and money received by the clerk cannot be said to be received by the county. Also, as to the fines paid, there is no unjust enrichment of the county, since it never received the money, either directly or indirectly. An action in the nature of money had and received for the money paid as fines therefore cannot lie against the county.

In *Gray v. Callender* (1899), 181 Ill. 173, this court held that "where one person pays money to another with the mutual understanding that it is to be applied to a particular purpose, and the person so receiving the money fails to apply it to that purpose but pays it over to a third person who has no right to it, then an action for money had and received lies in favor of the party so paying the money, against the one receiving it from him." (*Gray v. Callender* (1899). 181 Ill. 173, 176-77.) Conversely, it was held in *City of Chicago v. Fidelity Savings Bank* (1882), 11 Ill. App. 165, that since the city had never received tax money wrongfully collected by the town collector and since the town collector was not the agent of the city, an action against the city for money had and received did not lie. The court stated:

> "In an action for money had and received, it is essential to prove that the defendant has actually received the money or money's worth. It is not enough to show that there is money in the hands of a third person which the defendant is entitled to receive * * *." (*City of Chicago v. Fidelity Savings Bank* (1882), 11 Ill. App. 165, 169.)

Essentially the same situation exists here. The plaintiffs paid the money to the clerk of the court for the purpose of satisfying the judgment against them and so that the clerk would disburse the funds to the proper authorities. The clerk, through an apparent mistake, paid the money to the State and the town of Normal, third parties who had no right to the money. The county, though legally entitled to the money, never received it. We need not decide here whether plaintiffs may recover from those who received the money or from the clerk. However, under these facts, no recovery for the fine money can be had from the county.

In view of our holding that the clerk of the circuit court is not a county officer, money received by the clerk

as fines is not, *ipso facto*, received by the county. However, any money received by the county into its treasury is recoverable from the county. In this instance, the court costs paid by the plaintiffs and received by the county are to be refunded to the plaintiffs.

We hold that the clerk of the circuit court is not a county official. The judgment of the appellate court is therefore reversed and the judgment of the circuit court of McLean County is affirmed, and the cause is remanded to the circuit court of McLean County.

Appellate court reversed;
circuit court affirmed;
cause remanded.

APPENDIX B

No. 80-3411

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDDIE THOMPSON, JR.	
Plaintiff-Appellant	ORDER
v.	[Filed Sep. 14, 1981]
MARY ANN WOLTENBERG,	
Defendant-Appellee	

BEFORE: ENGLE, MERRITT and KENNEDY, Circuit Judges

This appeal has been referred to a panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. After examination of the record and briefs, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

Appellant filed his pro se complaint in the district court pursuant to 42 U.S.C. §1983. The complaint alleges that appellee, Chief Deputy Clerk for the Kenton District Court, conspired with a judge of the Kenton District Court to illegally incarcerate appellant because of his race. The district court granted appellee's motion for summary judgment, and appellant filed his appeal with this Court.

Appellant has alleged a conspiracy between appellee and a judge. It is well established that a judge acting in his official capacity is immune from suit under 42

U.S.C. §1983. *Dennis v. Sparks*, ... U.S. ....., 101 S.Ct. 183, 186 (1980); *Procunier v. Naverette*, 434 U.S. 555, 561 (1977); *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967); *Stump v. Sparkman*, 435 U.S. 349 (1978). Additionally, it is well established that an individual performing a ministerial duty at the direction of a judge acting in an official capacity is immune from suit. In this case appellee was merely performing the duties of a clerk of court in the usual manner, and under the direction of a judge. Thus, appellee is immune from suit under 42 U.S.C. §1983. *Smith v. Martin*, 542 F.2d 688, 691 (6th Cir. 1976); *Denman v. Leedy*, 479 F.2d 1097, 1098 (6th Cir. 1973); *Waits v. McGowan*, 516 F.2d 203, 206 (3rd Cir. 1975).

Since the issues upon which a determination of this cause depends appear so unsubstantial as not to need further argument, it is ORDERED that the district court judgment of April 8, 1980, and order of May 2, 1980, be, and hereby are, affirmed. Rule 9(d)3, Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

FEB 22 1982

No. 80-2205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois,

Petitioner,

v.

TONI MURRAY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW TO FILE A BRIEF AMICUS CURIAE AND BRIEF FOR THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

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In The

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October Term, 1980

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Petitioner,

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Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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MOTION OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW TO FILE A BRIEF AMICUS CURIAE

The Chicago Lawyers' Committee for Civil Rights Under Law hereby respectfully moves for leave to file a brief amicus curiae in the above-captioned case in support of the Respondent. The consent of the attorney for the Respondent has been obtained. The consent of the attorney for the Petitioner was requested but refused.

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States. Its purpose was and still is to involve private attorneys throughout the country in a national effort to assure civil rights to all Americans. The Chicago Lawyers' Committee for Civil Rights Under Law ("the Lawyers' Committee") was organized in 1969 as one

of many such committees throughout the country. Over the past thirteen years, the Lawyers' Committee has enlisted the services of hundreds of members of the private bar in addressing the legal problems faced by minorities and the poor in obtaining equal legal representation and in confronting legal issues arising in voting, employment, housing, municipal services, the administration of justice, and law enforcement.

This case touches upon the adequacy of ministerial procedures established by the Clerk of the Circuit Court of Cook County, Illinois to give full effect to judicial orders and assure the efficient operation of a large metropolitan court system in conformity with the requirements of due process. It also poses the question whether an elected official can claim absolute official immunity as an officer of the court even when he fails to carry out a court order thereby leading to an undisputed violation of an individual's basic civil rights.

The interest of the Lawyers' Committee in the instant case arises from the unwarranted threat the broad position put forth by Petitioner poses to the availability of 42 U.S.C. § 1983 to the poor and minorities as an effective means to redress violations of individual civil rights occasioned by state action. Because 42 U.S.C. § 1988 permits a successful section 1983 plaintiff to recover his attorney's fees and costs, that section is often the only means of redress for the poor and minorities whose civil rights have been denied. The position urged by Petitioner has far-reaching implications that extend beyond disposition of the instant case. For Petitioner's position allows no principled distinction between extending immunity to the conduct challenged herein and any failure to perform a ministerial act by countless other officials at all levels of government.

Because of the Lawyers' Committee's interest in the outcome of this case and because Respondent cannot fairly be expected to address in complete fashion the broader implications of Petitioner's position while also effectively arguing the merits of her position, the Lawyers' Committee respectfully requests leave to file the attached brief amicus curiae. The arguments set forth in the brief amicus curiae are relevant to disposition of this case.

Respectfully submitted,

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In The

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MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois,

Petitioner,

v.

TONI MURRAY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States. Its purpose was and still is to involve private attorneys throughout the country in a national effort to assure civil rights to all Americans. The Chicago Lawyers' Committee for Civil Rights Under Law was organized in 1969 as one of many such committees throughout the country. Over the past thirteen years, the Chicago Lawyers' Committee for Civil Rights Under Law has enlisted the services of hundreds of members

of the private bar in addressing the legal problems faced by minorities and the poor in obtaining equal legal representation and in confronting legal issues arising in voting, employment, housing, municipal services, the administration of justice, and law enforcement.

This case touches upon the adequacy of procedures established by the Clerk of the Circuit Court of Cook County, Illinois to give full effect to judicial orders and assure the efficient operation of a large metropolitan court system in conformity with the requirements of due process.* It also poses the question whether an elected official can claim absolute official immunity as an officer of the court even when he fails to carry out a court order thereby leading to an undisputed violation of an individual's basic civil rights.

Amicus curiae contends that no reason exists, either on the facts or in the law, that requires this Court to extend absolute immunity from civil liability to this particular public official. The most appropriate disposition of this matter would be to summarily affirm the decision of the Court of Appeals for the Seventh Circuit. In the alternative, the writ should be dismissed as improvidently granted.

This Court should adhere to its practice of adjudicating constitutional questions only when the facts are clear and when such adjudication is necessary to the proper disposition of a case. Neither criteria prevails here. Remand for further discovery in conformity with the opinion of the court of appeals would permit the development of a proper factual record and would obviate the need for resolution of constitutional issues that are posed with marked lack of clarity on the present record.

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* The geographic area covered by Cook County includes Chicago and certain surrounding suburban areas.

STATEMENT OF FACTS

The relevant undisputed facts in this matter are as follows. Respondent's purse and checkbook were stolen. The theft was reported to the police. Six to twelve months thereafter some of the stolen checks were cashed. Respondent was then arrested on charges of deceptive practices. A hearing was held on November 4, 1974 in one of the branch courts of the Circuit Court of Cook County. All charges against her were dismissed except one which was continued until December 9, 1974. Respondent erroneously understood all the charges to have been dismissed. Therefore, on December 9, 1974 she failed to appear in court. A warrant issued for her arrest. Hearing of the warrant, she voluntarily appeared in court on January 13, 1975 and the judge then sitting entered an order quashing the warrant and directed that the necessary forms to recall the arrest warrant be processed. This judicial order was never carried out.

The deputy clerk, assigned to the court on that day, averred in an affidavit that, to the best of his recollection, he filled out a warrant recall form as directed by the judge. To the best of his recollection, copies of the warrant recall form were bundled together and placed in the "out work" for that day. Other deputy clerks, also under the supervision and control of the Clerk of the Court, were to be responsible for delivery of the warrant recall form to the Chicago Police Department. [App. 36].

The Chicago police officer assigned as "warrant sergeant" to the Warrant Division at Chicago Police Headquarters in an affidavit denied that the warrant recall form was duly processed. He attested that he could find no record on the court transmittal sheets, the

official court record of the daily court proceedings, that the recall of the warrant had ever been issued. Nor could he find any record in the Chicago Police Department's internal warrant recall book that the Chicago Police Department had ever received any notification from the Clerk of the Court that the warrant had in fact been recalled by judicial order. [App. 48-49].

The case was continued to February 10, 1975.* On that date the last remaining charge against Respondent was dismissed. On March 25, 1975, several months after a judge had ordered the warrant quashed and warrant recall forms processed, Respondent was arrested in her home pursuant to that arrest warrant. Although Respondent explained to the arresting officers that the case against her had been dismissed and the warrant recalled, she was taken into custody, stripped naked, and searched while being observed by Chicago police officers. She was imprisoned for six to seven hours, prior to being released. Following her release from police custody, she was hospitalized for five days and received medical treatment.

On April 10, 1975, she appeared in court once again and was discharged.

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* The "half-sheet," the official court record of the case at issue is a perfect jumble. [App. 42]. It shows dates and warrant recall numbers crossed out. Small wonder the warrant recall form was never properly processed.

STATEMENT OF CASE

Respondent filed the instant action under 42 U.S.C. § 1983 against the City of Chicago, the Chicago Police Department, the arresting officers, and the Clerk of the Court. The district court granted motions to dismiss on behalf of all the defendants, other than the Clerk of the Court. In respect to the Clerk of the Court, the district court granted a motion for summary judgment supported by affidavits that, on their face, are conclusory in nature and internally contradictory. No opportunity for cross-examination or discovery was afforded Respondent.

The Court of Appeals for the Seventh Circuit reversed the district court in every respect, stating:

> It seems clear that appellant sustained a violation of constitutional rights by being arrested and detained pursuant to an invalid warrant. The defendants should not be permitted to 'get off the hook' by merely pointing the finger at each other. Someone is surely at fault for failing to establish or execute appropriate procedures for preventing such serious malfunctionings in the administration of justice. Plaintiff should be entitled to discovery in order to determine who is the true culprit responsible for the wrong done to her.

Murray v. City of Chicago, 634 F.2d 365, 366 (7th Cir. 1980). The Clerk of the Court alone filed a *writ of certiorari.*

SUMMARY OF ARGUMENT

Petitioner does not contest that procedures established by his office or improper performance of ministerial duties by deputy clerks acting under his supervision and control directly or indirectly caused Respondent to suffer a gross deprivation of her civil rights. Instead he argues that his status as a court official entitles him to absolute derivative immunity from civil liability under the Civil Rights Act even if he failed to establish adequate procedures to assure enforcement of judicial orders and even if he failed to properly supervise his employees.*

If, on the present state of the record, the Clerk of the Court prevails, no courtroom personnel can ever be held liable under the Civil Rights Act regardless of any act they perform or fail to perform. No officials, including judges themselves, enjoy so sweeping an absolute immunity. Nothing in this Court's prior interpretation of the Civil Rights Act countenances such immunity.

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* Amicus Curiae does not necessarily contend that Petitioner in this instance did in fact fail to establish adequate procedures, or that any individual clerk acted improperly or carelessly or even that Petitioner has in fact failed to carry out his responsibility to supervise deputy clerks in the performance of their duties. On the present state of the record, affidavits notwithstanding, we simply do not know. Indeed the affidavits raise more questions than they answer.

ARGUMENT

I.

NO REASON EXISTS TO AFFORD A CLERK OF THE COURT ABSOLUTE IMMUNITY UNDER THE CIVIL RIGHTS ACT WHERE HE FAILS TO GIVE EFFECT TO A JUDICIAL ORDER.

Petitioner argues that he is entitled to sweeping absolute immunity from any civil liability for three reasons. First, he contends that he is a mere agent of the Court, answerable to and acting at the direction of the Court alone. He contends that he partakes derivatively of the absolute immunity enjoyed by judges. The facts belie the claim. The Clerk of the Court of Cook County is a politically elected official, responsible to the party that has slated him and to the electorate that voted him into office. *See Ill. Rev. Stat.* ch. 25, § 1.

Secondly, seeking to enlist the sympathy of this Court, and pandering to a legitimate concern for efficiency in the administration of justice, Petitioner pleads an over-burdened court system as an excuse for whatever systemic failure might otherwise be laid at his door. This appeal to sympathy is of no constitutional weight. Indeed, the more over-burdened and impersonal a large metropolitan court system is, the more essential are effective and efficient procedures to protect the integrity of its operation. Where the personal touch cannot readily remedy wrongs, only the smooth operation of established procedures protects essential liberties.

Third, Petitioner claims that any attempt to impose civil liability upon him interferes with the free exercise of his discretion in establishing procedures for the efficient operation of the court system. This argument is arrant nonsense. Far from deterring Petitioner from es-

tablishing effective procedures fear of potential liability will goad him to improve upon them.* Removal of that fear of liability by this Court is hardly likely to enhance a performance that already falls far short of the optimal.** *See Owen v. City of Independence*, 445 U.S. 622, 650-51 (1980).

Amicus curiae is prepared to concede that where a clerk of court merely follows the dictates of a judicial order he cannot incur liability under the Civil Rights Act for whatever wrongs may flow therefrom. By following a judicial order he is *ipso tanto* invested with the immunity that attends the judge's act, when the judge acts in a judicial capacity. *Slotnick v. Garfinkle*, 632 F.2d 163, 166 (1st Cir. 1980); *Ashbrook v. Hoffman*, 617 F.2d 474, 476-77 (7th Cir. 1980); *Williams v. Wood*, 612 F.2d 982, 984-86 (5th Cir. 1980); *Lockhart v. Hoen-*

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* It was fear of section 1983 civil liability that led Petitioner to warn the deputy clerks who work under his supervision and control:

> From time to time the clerk will be required to process motions to recall warrant [sic] and motions to vacate bond forfeitures. This is a particularly crucial area for the clerks, as a failure to follow the correct procedure may expose both the individual clerk and the clerk's office to liability under the Civil Rights Act Title 42 U.S.C. ¶1983 as an infringement of a defendant's civil rights. [App. 45].

Properly speaking the clerk does not "process" *motions* to recall warrants at all; he processes *orders*, signed by a judge, quashing the arrest warrant and ordering that it be recalled.

** On this record, we do not know whether the failure to recall this particular arrest warrant was an inadvertent and rare event or a frequent occurrence caused by fatally defective procedures or by consistently inadequate supervision of those employees charged with carrying out those procedures. However, from the reported cases alone, it is clear that this case does not represent a unique failure in the Circuit Court of Cook County. *E.g., Powe v. City of Chicago*, No. 80-2731 (7th Cir., Nov. 11, 1981).

stine, 411 F.2d 455, 459-60 (3d Cir.), *cert. denied*, 396 U.S. 941 (1969).

Such, however, is not the case here. Here, the actions or the failure to act that are challenged are not the mere adherence to a judicial order. On the contrary. The challenged act is that a clerk *failed* to give effect to a judicial order, thereby making it a nullity.

Congress, in passing the Civil Rights Act, clearly intended the sting of potential civil liability for any violation of basic civil rights to encourage public officials to put their own houses in order. *See, e.g., Owen v. City of Independence*, 445 U.S. at 650-51. Congress intended that procedures be established by public officials to assure that civil rights are protected. *See, e.g., id.* It further intended that public officials supervise their employees so that violations of civil rights would not occur. *See Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 n.58 (1978).

Cognizant of these aims this Court has repeatedly said that claims for official immunity—be that immunity absolute or merely partial—must be strictly construed lest entire spheres of government activity elude the restraint to which Congress intended them to be subject. *E.g., Butz v. Economou*, 438 U.S. 478 (1978); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Accordingly, any blanket claim for official immunity has been scrupulously examined and sparingly granted. *Id. See also Dennis v. Sparks*, 449 U.S. 24, 29 (1980); *Owen v. City of Independence*, 445 U.S. at 651; *Ferri v. Ackerman*, 444 U.S. 193, 203-04 (1979); *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976). Only where official immunity is an essential and necessary prerequisite for the free exercise of that discretion that inevitably must attend certain acts of government has this Court recognized absolute immunity from the operation of the Civil Rights Act. *See, e.g.,*

Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719, 736 (1980); *Ferri v. Ackerman*, 444 U.S. at 203-04.*

Here, there is no exercise of official discretion that must be protected. The only acts at issue are purely ministerial in nature. Courts have not generally recognized the existence of an absolute immunity from the operation of the Civil Rights Act for acts of a purely ministerial nature. *E.g., McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972); *Illinois v. May*, 251 Ill. 54, 95 N.E. 999 (1911). Both the act of Petitioner in establishing warrant recall procedures pursuant to General Order 74-8(M) and the acts that the deputy clerk was to have performed, but failed to perform, in order to give effect to a judicial order, are purely ministerial in nature. There is no basis in law to argue that such acts must, as a matter of law, be absolutely immune from liability under the Civil Rights Act. *McCray v. Maryland*, 456 F.2d at 3-5.

The mere fact that Petitioner acts as the handmaiden of the court does not give rise to a derivative immunity even when he fails to obey a judicial order. The cases that seem to hold that a clerk of the court is invested with such derivative immunity arose in situations where the clerk was merely giving effect to a judicial order. In such cases he clearly should not be held liable for following the order of the judge. *Slotnick v. Garfinkle*, 632 F.2d at 166; *Lockhart v. Hoenstine*, 411 F.2d at 459-60. Cases that extend immunity without undertaking such an analysis are not decided on a principled basis, *e.g.*,

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* For an excellent recent discussion of the policy concerns underlying the concept of official immunity see generally Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*. 1980 SUPREME COURT REVIEW, 281.

Davis v. McAteer, 431 F.2d 81, 82 (8th Cir. 1970), or rely exclusively on cases that *do* involve the exercise of judicial discretion. *City of Louisville v. Bergel*, 610 S.W.2d 292, 293 (Ky. 1980) (relying upon *Henry v. Wilson*, 249 Ky. 589, 61 S.W.2d 305 (1933), involving a judge's exercise of judicial discretion); *Rodriguez v. New York*, 55 Misc.2d 669, 674, 285 N.Y.S.2d 896, 901 (1967) (relying on *Jameison v. New York*, 4 Misc.2d 326, 158 N.Y.S. 2d 496 (1956), involving a court clerk's exercise of judicial discretion). As the *McCray* court appropriately recognized:

> A . . . defense is afforded all public officers who act in obedience to a judicial order or under the court's direction. It was this defense which protected the court clerk in Sullivan v. Kelleher, Rhodes v. Houston, Ginsburg v. Stern, and Niklaus v. Simmons. Thus in every instance cited by the District Court where "judicial immunity" was accorded a court clerk, he was in fact acting regularly and lawfully. McCray here alleges very different circumstances—he asserts that the clerk impeded the filing of his papers. If the claim is true, the clerk was acting in direct violation of his statutory duties. In cases where an official's lawful authority was exceeded or the court order not followed no immunity was recognized and the officer was held liable under section 1983 if his actions abridged an individual's federally protected rights. In the situation alleged by plaintiff in this case, the clerk is entitled to no more protection than any other state ministerial functionary who fails to discharge a mandatory duty. (citations and footnotes omitted).

McCray v. Maryland, 456 F.2d at 5.

Petitioner is not, as he suggests, subject either to the pleasure or the will of any judicial officer. He is an elected public official, with clear statutory duties, *see, e.g.*, ILL. REV. STAT. ch. 25, §§ 1-15, and answerable ulti-

mately to the public. He cannot therefore lay claim to a derivative immunity when the source of his powers, duties, and obligations is independent of any judge.

II.

PETITIONER CANNOT AVOID RESPONSIBILITY FOR HIS EMPLOYEES IF HE FAILS TO SUPERVISE THEIR ACTIONS ADEQUATELY

Petitioner suggests that he cannot be held liable for the acts of his employees under the Civil Rights Act on the basis of *respondeat superior*. Such is simply not the law; he may be held liable under section 1983 for a failure to properly perform his supervisory responsibilities. *Monell v. New York City Department of Social Services*, 436 U.S. at 694 n.58. Petitioner begs the question in stating that the mere negligence of an employee cannot become the predicate for such liability. *See Parrat v. Taylor*, 49 U.S.L.W. 4509 (May 18, 1981). The fatal flaw in that argument is that the district court, in untimely fashion, forestalled precisely the inquiry that Petitioner contends was made. There was no opportunity given to Petitioner to demonstrate that this was indeed a single act of negligence. So too there was no opportunity given to Respondent to demonstrate that her case was not an isolated occurrence but was symptomatic of a systemic and repeated failure in the procedures established by Petitioner and in the supervision he accords to the work of his employees. Petitioner cannot contend that no liability exists for a repeated failure to properly exercise supervisory control. This Court has said that such liability does exist. *Monell v. New York City Department of Social Services*, 436 U.S. at 694 n.58.

III.

THE COURT SHOULD NOT REACH THE MERITS AND SHOULD REMAND FOR FURTHER DISCOVERY.

Unless this Court is prepared to hold that the Clerk of the Court, as an elected public official, can never be held liable for any act, even when he willfully fails to give effect to a judicial order, this case should be remanded for further proceedings.

On the present state of the record, blame for the failure to recall the warrant cannot be squarely laid on any doorstep. What is apparent is that the procedures established to recall warrants are either generally inadequate or merely did not function in this particular instance. As the court of appeals correctly observed in this case: "Summary judgment should not be granted unless it is clear that upon no conceivable state of facts as shown by the proof could a plaintiff recover. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962)." *Murray v. City of Chicago*, 634 F.2d at 366.

Even if it is established that a systemic failure in the procedures established by Petitioner or inadequate supervision of employees entrusted to carry out those procedures* indirectly caused the harm Respondent suffered, multiple defenses available in tort law are still applicable. *E.g., Imbler v. Pachtman*, 424 U.S. at 418. Thus it may well be that the proximate or intervening

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* Surely Petitioner would not suggest that if the procedures he had established to recall warrants failed in fifty percent of the cases, he would still be immune from civil liability. So too it stretches reason to suggest immunity would exist even if Petitioner had knowledge that his employees regularly stuffed warrant recall forms into the nearest trash can rather than deliver them to the Chicago Police Department.

cause of the violation of Respondent's civil rights was not the failure to recall an arrest warrant, but rather police behavior that was totally excessive and unwarranted.*

Amicus Curiae urges this Court not to use the occasion of these exceedingly sketchy facts as an opportunity to extend the immunity of court clerks to its broadest possible reach. In the event this Court does not wish summarily to affirm the opinion of the Court of Appeals for the Seventh Circuit, nothing would be lost and much gained in dismissing the writ, as improvidently granted and remanding the case for further proceedings in conformity with the opinion of the Court of Appeals for the Seventh Circuit.

* The Chicago Police Department has been sued for its habit of strip searching arrested females on charges as innocent as traffic violations. A consent order agreeing to stop wholesale strip searches has been entered in the case of *Doe v. City of Chicago*, No 79 C 789 (N.D. Ill., Mar. 26, 1980).

CONCLUSION

For all the foregoing reasons, Amicus Curiae respectfully submits that this Court should either affirm the judgment of the Court of Appeals for the Seventh Circuit or, in the alternative, dismiss the writ as improvidently granted.

Respectfully submitted,

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